No. 93-820

Supreme Court, U.S.
FILED
JUL 14 1993
OFFICE OF THE CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1993

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ASSOCIATED STUDENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,
Petitioners,

VS.

AVERELL SMITH, ARLO HALE SMITH, ADLAI SMITH, BRAD SPARKS, JIMMY HOM, EMILY TAYLOR, ALEXA SMITH, THOMAS KISTLER,
Respondents.

On Petition for Writ of Certiorari to the California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED[1]

1. Whether the First Amendment prohibits a state university from using a mandatory student activity fee to create a public forum for on-campus expressive activities by distributing a portion of the fee proceeds on a content-neutral basis to a wide variety of student groups, including groups devoted to political and ideological causes with which some students disagree, where the university has determined that funding such groups furthers its educational mission?

2. Whether the First Amendment prohibits a state university from using a mandatory student activity fee to fund a student government that, among other activities, debates and passes resolutions with which some students disagree that concern a wide variety of local, state, and national issues where the university has determined that funding such activities furthers its educational mission?

3. Whether the First Amendment prohibits a state university from using a mandatory student activity fee to fund lobbying on university- or student-related issues with which some students disagree, where the university has determined that funding such activity furthers its educational mission?

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[1]Petitioners are the Regents of the University of California, the President of the University of California (Jack W. Peltason), the Chancellor of the University's Berkeley Campus (Chang-Lin Tien), the Treasurer of the Regents (Herbert Gordon), and the Associated Students of the University of California, the organization authorized by the Regents to administer student government and student extra-curricular activities at the University of California's Berkeley campus. With the exception of Mr. Gordon, who is an original defendant, the individual Petitioners are the successors in interest of the original defendants David S. Saxon (the President of the University of California when the Complaint was filed) and Albert H. Bowker (the then-current Chancellor). Respondents are Averell Smith, Arlo Hale Smith, Adlai Smith, Brad Sparks, Jimmy Hom, Emily Taylor, Alexa Smith, and Thomas Kistler.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	9
I. THE CALIFORNIA SUPREME COURT'S HOLDING THAT A STATE UNIVERSITY CANNOT FUND STUDENT POLITICAL GROUPS IN A CONTENT-NEUTRAL MANNER WITH MANDATORY STUDENT ACTIVITY FEES ERRONEOUSLY DECIDES AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW AND CONFLICTS WITH BOTH THE SECOND CIRCUIT'S DECISION IN *CARROLL V. BLINKEN* AND NUMEROUS OTHER STATE AND FEDERAL CASES.	9
A. The Decision Below Conflicts With *Carroll v. Blinken* And With Numerous Other State And Federal Decisions Upholding The Use Of Mandatory Student Fees To Create On-Campus Fora For Political Speech.	10
B. The Decision Below Decides An Important Issue Of Constitutional Law In Conflict With The Decisions Of This Court.	20

Page

II. THE CALIFORNIA SUPREME COURT'S HOLDING THAT MANDATORY FEE PROCEEDS MAY NOT BE USED TO SUPPORT POLITICAL SPEECH BY A STUDENT GOVERNMENT ERRONEOUSLY DECIDES AN IMPORTANT ISSUE OF LAW. 26

III. THE CALIFORNIA SUPREME COURT'S HOLDING THAT MANDATORY FEE PROCEEDS MAY NOT BE USED TO SUPPORT LOBBYING ON UNIVERSITY-RELATED ISSUES ERRONEOUSLY DECIDES AN IMPORTANT ISSUE OF LAW. 28

CONCLUSION 30

TABLE OF AUTHORITIES

Cases — **Page**

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) — 20, 21, 22, 23, 24

Bethel School District v. Fraser, 478 U.S. 675 (1986) — 11

Buckley v. Valeo, 424 U.S. 1 (1976) — 22

Carroll v. Blinken, 957 F.2d 991 (2d Cir.), *cert. denied*, --U.S.--, 121 L. Ed. 2d 224 (1992) — passim

Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986) — 6, 15, 23, 24

Civil Service Commission v. Letter Carriers, 413 U.S. 548 (1973) — 7

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) — 16

Cornelius v. NAACP Legal Defense & Education Fund, 473 U.S. 788 (1985) — 18

Ellis v. Railway Clerks, 466 U.S. 435 (1984) — 24, 25

Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) — 28

Galda v. Rutgers, 772 F.2d 1060 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986) — 19, 22, 29

Gay & Lesbian Students Association v. Gohn, 850 F.2d 361 (8th Cir. 1988) — 24

	Page
Hays County Guardian v. Supple, 969 F.2d 111 (5th Cir. 1992), *cert. denied*, --U.S.--, 122 L. Ed. 2d 371 (1993)	16, 17, 18, 19
Healy v. James, 408 U.S. 169 (1972)	24, 26
Kania v. Fordham, 702 F.2d 475 (4th Cir. 1983)	16, 17, 18, 19
Keller v. State Bar of California, 496 U.S. 1 (1990)	6, 7, 20 21, 23, 24, 25
Lace v. University of Vermont, 303 A.2d 475 (Vt. 1973)	16, 17, 18, 19
Larson v. Board of Regents, 204 N.W.2d 568 (Neb. 1973)	16, 17, 18, 19
Lehnert v. Ferris Faculty Association, --U.S.--, 114 L. Ed. 2d 572 (1991)	8, 28
New York Times v. Sullivan, 376 U.S. 254 (1964)	25
Regents of the University of California v. Bakke, 438 U.S. 265 (1978)	12, 26
United States v. Albertini, 472 U.S. 675 (1985)	14, 16
United States v. O'Brien, 391 U.S. 367 (1968)	16
Veed v. Schwartzkopf, 353 F. Supp. 149 (D. Neb.), *aff'd*, 478 F.2d 1407 (8th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974)	17
Ward v. Rock Against Racism, 491 U.S. 781 (1989)	16, 24
Widmar v. Vincent, 454 U.S. 263 (1981)	12, 13, 18, 21

Page

Constitutional Provisions

U.S. CONST. amend. I passim

Statutes and Regulations

28 U.S.C. §1257(a) 1, 28

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PETITION FOR WRIT OF CERTIORARI

Petitioners Regents of the University of California, the President of the University, two other high University officials, and the Associated Students of the University of California respectfully pray that a writ of certiorari issue to review the judgment and opinion of the California Supreme Court entered in this case on April 15, 1993.

OPINIONS BELOW

The opinion of the California Supreme Court is published at 4 Cal. 4th 843, 844 P.2d 500, 16 Cal. Rptr. 2d 181 (1993), and reprinted in the separately bound Appendix to this Petition ("Pet. App.") at pages 1a-63a. The order of the California Supreme Court denying Petitioners' petitions for rehearing and modifying its opinion is published at 4 Cal. 4th 1232a and reprinted in the Appendix at pages 64a-66a. The California Supreme Court's opinion affirmed in part and reversed in part the decision of the California Court of Appeal published at 3 Cal. Rptr. 2d 384 (1992), and reprinted in the Appendix at pages 68a-95a. The opinion of the Court of Appeal followed the direction of the California Supreme Court that the Court of Appeal reexamine its first decision in this case in light of *Keller v. State Bar of California*, 496 U.S. 1 (1990). That order of the California Supreme Court is reported at 807 P.2d 1008, 279 Cal. Rptr 779 (1991), and is reprinted in the Appendix at page 96a. The first opinion of the California Court of Appeal is published at 248 Cal. Rptr. 263 (1988), and reprinted in the Appendix at pages 97a-122a. The trial court's statement of decision and judgment were not published. They are reprinted in the Appendix at pages 123a-147a.

JURISDICTION

The California Supreme Court rendered its opinion on Feb. 3, 1993. On April 15, 1993, the court modified its opinion and denied petitions for rehearing. Pet. App. 64a. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the First Amendment to the United States Constitution, which provides, in relevant part:

> "Congress shall make no law . . . abridging the freedom of speech . . . ."

STATEMENT OF THE CASE

The University of California at Berkeley requires each student to pay a student activity fee. At the time this case was tried, the fee was $12.50 per quarter. Pet. App. 3a. The University transfers $7.00 from each fee to the Associated Students of the University of California ("the ASUC"), the organization authorized by the University to administer student government and student extra-curricular activities at the Berkeley campus. Originally, payment of the fee entailed automatic membership in the ASUC; however, the ASUC changed its procedures over a decade ago to permit each student to decline membership. Ex. 253b.[1]

The ASUC uses the student activity fee to support both student activities and student government. Pet. App. 3a-4a. Among other things, it provides funds to approximately 150 student activity groups. *Id.* at 4a. Any four students at the University may form such a group and register it with the University. *Id.* All registered groups may, but need not, request funding from the ASUC. Student groups pursue diverse interests, including academic subjects, culture, sports, games, and politics. *Id.* Examples

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[1]Although the disposition of student fee proceeds is handled in the first instance by the ASUC Senate, the University retains ultimate control through a variety of means. Pet. App. 91a. University officials review the ASUC budget, receive the annual independent audit of ASUC finances, and attend all ASUC Senate meetings. *Id.* Moreover, the University's policies give it power to take "action to ensure that any activity under control of student governments is operated in accordance with . . . University policies and procedures . . . ." *Id.*

include the Physics Students Society, the Spanish Club, the Cal Ski Club, and the Chess Club. *Id.* at 5a.

To obtain funding, a student group must obtain approval from the ASUC Senate. *Id.* at 4a. Student groups do not receive lump sum appropriations; instead, approval merely makes the group eligible to receive reimbursement for incurred expenses within eleven categories: (1) personal services, (2) stationery and supplies, (3) telephone, (4) travel, (5) dues and subscriptions, (6) postage, (7) equipment rental, (8) advertising, (9) programs and printing, (10) facilities rental, and (11) other related expenses. Pet. App. 4a-5a, 74a n.8, 103a n.8.

The student groups funded by mandatory fee proceeds include groups devoted to political or ideological goals. When this case was tried, these groups included both proponents and opponents of abortion (Pet. App. 19a), environmental groups, and groups advocating positions on a wide variety of other issues.[2]

The mandatory fee proceeds which the ASUC Senate makes available to student political groups may not be used for off-campus advocacy. Pet. App. 72a. To the contrary, the activities of these groups "are confined to campus," generally consisting of efforts "to educate fellow

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[2]At trial, Respondents objected to the ASUC's funding of fourteen groups: Amnesty International, Berkeley Students for Peace, Campus N.O.W., Campus Abortion Rights Action League, Gay and Lesbian League, Progressive Student Organization, REAP (Radical Education And Action Project), Spartacus Youth League, Students Against Intervention in El Salvador, Students for Economic Democracy, UC Berkeley Feminist Alliance and Women Organized Against Sexual Harassment, UC Sierra Club, Conservation and Natural Resources Organization, and Greenpeace Berkeley. Pet. App. 5a. They did not object to funding Berkeley Right To Life, an anti-abortion group.

The current recipients of student funding are even more diverse. Although current information is not in the record, the groups which received student activity fee proceeds during the 1991-92 academic year included Amnesty International, the Berkeley Ayn Rand Society, and Berkeley Students for Animal Liberation.

students about current issues and to generate debate." *Id.* These student groups "express their views by printing and/or distributing literature, staffing tables at Sproul Plaza [the central campus meeting area and a traditional forum for political advocacy], holding rallies or forums with one or more speakers, [and] showing films . . . ." *Id.* Some groups also "urge political action: they circulate petitions and encourage students to send letters or postcards to government officials." Pet. App. 72a-73a.[3]

With the exception of rules prohibiting the use of mandatory fees for "partisan political activities or any ballot measure" (Pet. App. 19a), or religious services or proselytizing (Pet. App. 74a), the funding of student groups is completely content-neutral. *Id.* The Court of Appeal found that "[t]here is no evidence that funding was approved or denied on account of a group's position on a particular issue" (*id.*) or that "any group had been denied funding on the basis of ideology." Pet. App. 86a. Respondents did not seek review of these determinations in the California Supreme Court, and that court made no finding that any content-based discrimination had occurred.

In addition to using student activity fees to fund academic, cultural, recreational and political groups, the ASUC uses a portion of the fee proceeds to finance its own activities as a student government. The student government includes, inter alia, the ASUC Senate, a democratically elected body of 30 student representatives. Pet. App. 4a. Besides administering student affairs, the ASUC Senate debates and passes resolutions on a wide variety of local, state, national and international issues. *Id.* However, with respect to issues that are not University-related, the ASUC Senate takes no steps to transform its resolutions into public

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[3]The description in text of the student political activities funded by the fee is taken from the second Court of Appeal opinion. Although the California Supreme Court disagreed with the legal conclusion reached in this opinion, nothing in the California Supreme Court's opinion contradicts this description of the political activity at issue in this case.

policy, except for occasionally publicizing its resolutions on the Berkeley campus. That is because University regulations bar the use of mandatory fee proceeds to support positions taken by the ASUC Senate "except for University-related purposes." Pet. App. 72a.

Proceeds from the student activity fee are also used to support lobbying efforts by two groups affiliated with the ASUC: the University of California Lobby and the ASUC Municipal Lobby. Pet. App. 4a. University policies permit student governments to lobby at all levels of government, but only on University-related issues. Pet. App. 77a, 134a. The University of California Lobby has lobbied the State Legislature in favor of using registration fees to fund abortions, against budget cuts for the University, and in favor of mandatory student fees. Pet. App. 76a-77a. The ASUC Municipal Lobby has lobbied the City of Berkeley on public transportation fares, zoning and rent control, and has endorsed student candidates for municipal appointive office. Pet. App. 5a, 77a.[4]

This case began in 1979 when four of the Respondents filed suit in California Superior Court challenging the Regents' collection and use of the student activity fee as a violation of the First Amendment and various California constitutional provisions and statutes. Pet. App. 5a-6a. A

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[4]The majority opinion below states that the Municipal Lobby lobbied on issues unrelated to the University such as the City of Berkeley's investment policy and a nuclear freeze initiative. Pet. App. 4a, 24a. This is only half right. The Student Lobby did not take a position on the nuclear freeze; all it did was hold an on-campus forum on the issue, with both sides represented. RT ("Reporter's Transcript") 363-64. Similarly, the Municipal Lobby did not take a position on divestment (RT 438), although it apparently mediated between competing groups in some unspecified fashion to help put the initiative on the ballot. RT 439. This latter example therefore may have been one of the "isolated instances" referred to by the trial court in which University policies were violated. *See* Pet. App. 129a. Since Petitioners do not argue for the right to conduct lobbying with mandatory fees on issues unrelated to the University or its students, the resolution of this factual issue is irrelevant to this Petition.

year later, the other Respondents filed individual actions in small claims court raising the same issues. Pet. App. 6a. Petitioner ASUC then filed an action in Superior Court to enjoin the small claims court proceedings and obtain a declaration that the fee was constitutionally imposed and used. Pet. App. 69a. All these actions were subsequently consolidated. Pet. App. 6a.[5]

These cases were tried in 1982. Following trial, the Superior Court rendered a statement of decision and judgment in favor of Petitioners. Pet. App. 123a-147a. On appeal, the California Court of Appeal affirmed. Pet. App. 97a-122a. Respondents then filed a petition for review with the California Supreme Court. That court granted review but deferred a ruling pending this Court's decision in *Keller v. State Bar of California*, 496 U.S. 1 (1990). After *Keller* was decided, the California Supreme Court instructed the Court of Appeal to vacate its prior decision and reconsider the matter in light of *Keller*. Pet. App. 96a. The Court of Appeal again affirmed the trial court's judgment. Pet. App. 68a-95a. Respondents again sought review in the California Supreme Court. The Court granted their petition for review and, by a 5-2 vote, reversed the Court of Appeal's decision. Pet. App. 1a-63a.

Relying on *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), the court held that Petitioners had to show that their use of the student activity fee to fund political and ideological speech served a compelling state interest "that cannot be achieved through means less restrictive of associational freedoms." Pet. App. 10a (citing 475 U.S. at 303 n.11 (internal citation omitted)). The court then used this standard to compel Petitioners to identify and cease funding

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[5]Although Respondents continued to raise various state law claims throughout the course of this litigation, the claims were rejected by the California Court of Appeal. Pet. App. 90a-94a. The California Supreme Court expressly declined to reach any of Respondents' claims other than those based on the First Amendment. Pet. App. 8a n.7, 30a. The decision below therefore cannot be sustained on any non-federal ground.

with mandatory fees those student groups whose political and ideological goals "outweigh" the educational benefits they provide:

> "[A] group's dedication to achieving its political or ideological goals, at some point, begins to outweigh any legitimate claim it may have to be educating students on the University's behalf. To fund such a group through mandatory fees will usually constitute more of a burden on dissenting students' speech and associational rights than is necessary to achieve any significant educational goal. The University can teach civics in other ways that involve a lesser burden on those rights or no burden at all." (Pet. App. 12a)[6]

The majority opinion thus requires Petitioners "to identify any groups that are ineligible for mandatory funding" under this vague and imprecise standard and to "offer students the option of deducting a corresponding amount from the mandatory fee." Pet. App. 22a. Students who disagree with Petitioners' calculation must be given the full panoply of procedural remedies recognized in *Keller*: "an adequate explanation of the basis of the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* (citation omitted).

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[6] The majority opinion also criticized Petitioners for distinguishing between partisan activity and other political expression, stating that this distinction "borders on the absurd." Pet. App. 21a. In fact, however, the distinction between partisan political activity and other forms of political expression has been specifically upheld by this Court. *Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548, 575-80 (1973).

The majority opinion also prohibits Petitioners from using mandatory fee proceeds for lobbying, even on student- or university-related issues. Pet. App. 23a-27a. While it acknowledged that union dissenters may be compelled to support lobbying directly related to the union's collective bargaining responsibilities (*Lehnert v. Ferris Faculty Ass'n*, --U.S.--, 114 L. Ed. 2d 572, 590 (1991)), the court held that the ASUC, unlike a union, is not charged by State law with bargaining on behalf of its membership. Hence, the court found that Petitioners' only rationale for funding lobbying was educational. Pet. App. 27a. The court found this rationale insufficient, as it concluded that the University's educational mission could not justify providing "educational benefit to a few student lobbyists." *Id.* The decision below thus requires a check-off and refund procedure for lobbying expenses, as well as for the expenses of "political" and "ideological" groups.

With respect to the ASUC's own political activities, the court remanded Respondents' claims for further consideration of two issues. First, the court noted a disagreement in the record as to whether these activities had been funded by mandatory fees, and ordered the lower courts to make that determination. Pet. App. 28a-30a. Second, the court instructed the lower courts that, if mandatory fees had been used to fund these activities, this funding was subject to the same "strict scrutiny" the court applied to funding other student political activity. Pet. App. 29a-30a.

Although it agreed with the majority opinion that funding lobbying with mandatory fees is impermissible, the dissenting opinion below greeted every other point made by the majority with stinging criticism. It accused the majority of misreading the opinions of this Court (Pet. App. 31a), rendering a decision inconsistent with "*unanimous* state and federal case law" (*id.* (emphasis in original)), paying insufficient deference to the Regents' educational judgment that student groups "help contribute to the mission of the University" (Pet. App. 32a), and applying the wrong constitutional standard. Pet. App. 41a-42a. Instead of

resting its holding "on a spurious and ill-defined distinction between 'educationally beneficial' and 'ideological' speech" (Pet. App. 31a), the dissent would have followed the Second Circuit's opinion in *Carroll v. Blinken*, 957 F.2d 991 (2d Cir.), *cert. denied*, --U.S.--, 121 L. Ed. 2d 224 (1992), and permitted mandatory fees to be used for on-campus political speech by students, while prohibiting such fees from being used for off-campus speech. The dissent underscored its disagreement with the majority by stating that "the majority's holding . . . represents such a radical departure from educational reality and settled law . . . that I urge the University to petition . . . for certiorari and [the] high court to grant review." Pet. App. 34a-35a.

REASONS FOR GRANTING THE WRIT

I.

THE CALIFORNIA SUPREME COURT'S HOLDING THAT A STATE UNIVERSITY CANNOT FUND STUDENT POLITICAL GROUPS IN A CONTENT-NEUTRAL MANNER WITH MANDATORY STUDENT ACTIVITY FEES ERRONEOUSLY DECIDES AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW AND CONFLICTS WITH BOTH THE SECOND CIRCUIT'S DECISION IN *CARROLL V. BLINKEN* AND NUMEROUS OTHER STATE AND FEDERAL CASES.

The decision below is in direct conflict with the Second Circuit's decision in *Carroll v. Blinken*, 957 F.2d 991 (2d Cir.), *cert. denied*, --U.S.--, 121 L. Ed. 2d 224 (1992). The decision is also irreconcilable with numerous other state and federal decisions that have rejected constitutional challenges to the use of mandatory student fees to create on-campus fora for political speech. This conflict concerns an important and recurring issue of constitutional law that the California Supreme Court decided erroneously.

A. The Decision Below Conflicts With *Carroll v. Blinken* And With Numerous Other State And Federal Decisions Upholding The Use Of Mandatory Student Fees To Create On-Campus Fora For Political Speech.

1. The decision below conflicts with *Carroll v. Blinken*. Although the majority below attempted to minimize the extent of the conflict, the two decisions identify the competing constitutional interests at stake differently, and weigh those interests according to different standards of judicial review. Not surprisingly, the two decisions reach diametrically opposite results.

Carroll v. Blinken involved a challenge to the use of a mandatory student activity fee levied by the State University of New York at Albany ("SUNY Albany") to fund the New York Public Interest Research Group ("NYPIRG"). NYPIRG, which the Second Circuit characterized as "an ideological organization" (957 F.2d at 994), used a portion of the fee proceeds to pay for a wide variety of on-campus and off-campus political activities. On-campus, NYPIRG sponsored forums, symposia and debates on selected national and international political issues (such as the arms race and health care), studied issues of concern to the student community (such as the state of the lighting in campus parking lots, the use of irradiated food on campus, and area bank policies on student credit cards), conducted similar research on off-campus issues (such as the divesture of state money from private institutions doing business in South Africa and nuclear power issues), and participated in projects such as small claims court assistance, local toxic waste cleanups, and voter registration drives. *Id.* Off-campus, NYPIRG employed numerous full-time professional staff members and lobbied state legislators and executive officials. *Id.* The students who challenged these expenditures alleged that they "strongly opposed" NYPIRG's political activity and sought to prevent their fees from being used to support that organization. *Id.* at 995.

Like the majority below, the *Carroll* court stated that using mandatory fees to fund student political activity burdens the dissenters' First Amendment rights. *Id.* at 999 ("[A]ppellants' right to be free from compelled speech suffers when NYPIRG uses student funds to raise issues on campus, organize the community and lobby the legislature in pursuit of 'economic and social injustice'"). But the Second Circuit's analysis of the interests justifying this burden was quite different than that of the decision below.

The *Carroll* court identified three separate interests which together justify use of a mandatory fee to fund NYPIRG's on-campus political activity: "the general promotion of extracurricular activities," "the facilitation of . . . 'participatory civics training,'" and "the stimulation of robust campus debate on a variety of public issues." *Id.* The court recognized that student political activity "enrich[es] the overall extracurricular lives of students" (*id.* at 1000) and gives students "a sense of civic activism and responsibility." *Id.* In contrast, the majority opinion below contains no analysis of these interests, beyond a grudging acknowledgement that some unspecified amount of on-campus political activity is "germane" to education (Pet. App. 12a, 18a), and a disparaging reference to the educational interests served by such activity as merely an attempt to "teach civics." Pet. App. 12a. Similarly, while *Carroll* recognized that using the mandatory student activity fee for on-campus political speech "create[s] a forum for the expression of diverse views" (957 F.2d at 1001), the decision below rejected Petitioners' contention that funding student political speech through mandatory fees is justified because it creates a public forum. *See* Pet. App. 13a n.8; *see* pp. 17-18, *infra*.[7]

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[7]Like the *Carroll* court, this Court has often recognized the role that extra-curricular activities play in education. For example, this Court said in *Bethel School Dist. v. Fraser*, 478 U.S. 675 (1986), that "[t]he process of educating our youth for citizenship . . . is not confined to books, the curriculum, and the civics class . . . ." *Id.* at 683. Similarly, Justice Stevens

(continued...)

Carroll also refuses to draw any distinction between "educationally beneficial" and "ideological" speech. Indeed, the *Carroll* court explicitly recognized that on-campus political speech furthers the university's educational mission:

> "SUNY Albany's interest in sponsoring and maintaining a thriving campus forum of vigorous advocacy and political action is itself a concern of constitutional dimensions, since a central purpose of the First Amendment is to guarantee the free interchange of views and energetic debate. This constitutional interest is no less forceful or applicable on campus than it is in the community at large. A university where NYPIRG petitions against nuclear power, where environmental groups advocate greater recycling, where opponents of South Africa debate opponents of divestment, and partisans of a dozen other causes press their cases is a university fulfilling its traditional mission in a free society." (957 F.2d at 1001 (citations omitted))

In contrast, the decision below forces the Regents to make the distinction rejected in *Carroll*, and analyze whether the "political" or "ideological" content of *each* group's activities

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[7](...continued)
stated, in his concurring opinion in *Widmar v. Vincent* that extra-curricular activities "are a critical aspect of campus life" (454 U.S. at 279 n.2 (Stevens, J., concurring in the judgment)), while Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), stressed the importance of informal education in exposing students to diverse ideas. *Id.* at 312-13 & n.48 (opinion of Powell, J.). Yet the majority opinion below ignored these precedents and slighted the role that extra-curricular activities play in providing a university education.

"outweighs" the activities' educational value. Pet. App. 12a.[8]

Having thus identified the interests justifying using mandatory student fees to fund student political activity, the *Carroll* court then balanced those interests against the plaintiffs' First Amendment claims. Unlike the majority opinion below, the Second Circuit did not invoke "strict scrutiny" by demanding that the university show a "compelling state interest" to justify imposing the fee. *Compare* Pet. App. 10a. Instead, the *Carroll* court upheld the fee on a finding that the university's interests were "substantial enough to justify the infringement of appellants' First Amendment right against compelled speech that occurs when SUNY Albany transfers a portion of the activity fee to NYPIRG." 957 F.2d at 1001. Similarly, the *Carroll* court did not require the university to show that the interests justifying the fee could not be achieved "through means significantly less restrictive of associational freedoms." *See* Pet. App. 10a. Instead, because the university was seeking "to expand campus speech by facilitating the activities of a wide

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[8]*Carroll* and the decision below also differ in the degree of deference given by the court to the expert judgments of university administrators regarding the importance of extracurricular activities to the university's educational mission. In "scrutinizing the substantiality of SUNY Albany's interest in funding NYPIRG with student activity fees," *Carroll* gives universities "wide latitude . . . to define and carry out their own education missions." 957 F.2d at 999. In contrast, the majority opinion below accords little or no weight to the University of California's judgment that funding on-campus political activity "gives students a chance to express their views on campus, to participate in campus administrative positions, to provide self-education in government processes, to develop social skills, [and] to inform the student body about a variety of issues . . . ." Pet. App. 11a.

In his concurring opinion in *Widmar v. Vincent*, Justice Stevens stated that judgments concerning the educational value of extracurricular activities "should be made by academicians, not by . . . judges, and their standards for decision should not be encumbered with ambiguous phrases like 'compelling state interest.'" 454 U.S. at 278-79 (Stevens, J., concurring in the judgment) (footnote omitted). The majority opinion below obviously failed to follow this principle.

variety of speakers" on a "content-neutral" basis (957 F.2d at 999), the Second Circuit invoked the First Amendment standard applied in *United States v. Albertini*, 472 U.S. 675 (1985), and asked only whether the university's interests "would be served less effectively absent the activity fee distribution regulation." 957 F.2d at 1001 (emphasis added).

These differing standards led to different—and opposite—results. The *Carroll* court found that imposing the fee was necessary to further the ability of student political groups to engage in on-campus expressive activity:

> "Clearly the ability of NYPIRG and other campus groups to function effectively is tied to the level of resources they can muster in support of their activities. Of equal importance is the stability and predictability the fee scheme provides; established organizations like NYPIRG that receive repeated Student Association backing can estimate their yearly funding with some accuracy and expect a steady annual flow of money. Viewed from the students' perspective, an alternate funding scheme would seem less likely to commit the university community to the goals of enriching campus life in promoting debate. Rather, funding would be balkanized and students would cease to be linked by a common bond to the tolerant support of all points of view." (*Id.* at 1001-02)

In contrast, the majority opinion in the California Supreme Court baldly asserted that "[t]he University can teach civics in other ways that involve a lesser burden on [dissenters' First Amendment] rights, or no burden at all." Pet. App. 12a. Yet it did not identify those ways, or examine how the University might achieve its goal of

promoting the diverse expression of on-campus opinion without imposing a mandatory fee.

Carroll and the decision below thus reach contrary conclusions as to whether a mandatory student activity fee can be used to fund on-campus political activity. Although it restricted the use of mandatory fees for activities unrelated to the SUNY Albany campus,[9] the *Carroll* court holds that mandatory student activity fees may be used to fund the on-campus political activity of an entity which the court itself described as "an ideological organization." *Id.* at 994. Indeed, under the regulation at issue in *Carroll*, the university funded precisely the same kind of groups whose funding Respondents have challenged in this case. *See* 957 F.2d at 993 (groups funded at SUNY Albany included Revisionist Zionist Alliance, Feminist Alliance, Gay and Lesbian Alliance, and Amnesty International). In contrast, under the decision below, the University must differentiate between groups engaged in on-campus political speech, and use proceeds of the mandatory fee to fund only those groups which provide educational benefits that "outweigh" the group's dedication to its "political" or "ideological" goals. Pet. App. 12a.[10]

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[9]*Carroll* held that the educational interests asserted by the university did not justify funding NYPIRG's speech away from the Albany campus, since that speech did not benefit SUNY Albany students. 957 F.2d at 1002. Accordingly, the court ordered NYPIRG to collect no more from students at SUNY Albany than it spent on activities related to that campus. *Id.* In contrast, the decision below holds that such earmarking is not a constitutionally permissible remedy (Pet. App. 29a), and requires Petitioners to institute a check-off and a *Hudson*-type refund procedure for the mandatory fee uses that it finds impermissible. Pet. App. 22a-23a, 27a.

[10]The majority opinion below attempts to cloak the extent of its disagreement with *Carroll* by intimating that that decision turned on the Second Circuit's evaluation of the educational benefits provided by NYPIRG's on-campus activities, thus implying that the Second Circuit might have reached a different result had it been faced with a challenge to the use of mandatory fee proceeds by another group whose activities

(continued...)

If the decision below stands, the legal standards governing use of mandatory student activity fees in the state universities of the Nation's two largest states will be governed by different rules, procedures, and remedies. This clear conflict should be resolved by this Court.

2. Numerous decisions other than *Carroll*, by both the supreme courts of several states and the federal Courts of Appeals, explicitly permit the use of mandatory student fees to pay for on-campus political expression.[11] These

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[10](...continued)
were less "educational" and more "ideological." *See* Pet. App. 14a ("the court found that NYPIRG offered benefits on campus that were 'substantial enough to justify the infringement . . .'"). As the dissent below noted (Pet. App. 53a n.9), the majority's attempt to distinguish *Carroll* will not wash. "[T]he Court of Appeal in *Carroll* did not premise its holding on the fact that NYPIRG promoted 'educational' rather than 'ideological' causes. On the contrary, the *Carroll* court recognized that despite its self-description as 'non-partisan' NYPIRG pursued clearly political ends, as did the 'partisans of a dozen other causes' on campus." *Id.* (quoting 957 F.2d at 1001). Indeed, as noted in text, the Second Circuit in *Carroll* explicitly referred to NYPIRG as "an ideological organization." 957 F.2d at 994.

The majority opinion below also attempted to show that the strict scrutiny it invoked was similar to the test invoked by the Second Circuit in *Carroll*. Pet. App. 14a-15a. Here, too, the opinion's attempt to minimize its conflict with *Carroll* is unavailing. *Carroll* applied the standard set forth in *United States v. Albertini*, 472 U.S. 675 (1985), which in turn is derived from *United States v. O'Brien*, 391 U.S. 367 (1968). The Court has held that the O'Brien test . . . "is little, if any, different from the standard applied to time, place, or manner restrictions" (*Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984)), and that standard, unlike "strict scrutiny," contains no "less restrictive alternative" criterion. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) ("a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's interests, but . . . it need not be the least restrictive or least intrusive means of doing so").

[11]*Hays County Guardian v. Supple*, 969 F.2d 111, 122-24 (5th Cir. 1992), *cert. denied*, –U.S.–, 122 L. Ed. 2d 371 (1993) (upholding use of mandatory student fees to subsidize student newspaper); *Kania v. Fordham*, 702 F.2d 475, 479-80 (4th Cir. 1983) (same); *Larson v. Board of*
(continued...)

cases recognize that a university may use mandatory student fees to "create[] a forum for . . . uninhibited and vigorous discussion on matters of campus and public concern" because creating such a forum "advances a central purpose of the University." *Hays County Guardian*, 969 F.2d at 123; *accord*, *Kania*, 702 F.2d at 477; *Larson v. Board of Regents*, 204 N.W.2d at 570-71; *Lace v. University of Vermont*, 303 A.2d at 478 ("the student association funds provide the monetary platform for various and divergent student organizations to inject a spectrum of ideas into the campus community").

The majority below recognized that these cases "uphold[] the use of mandatory fees to create public fora," but concluded that they "offer little assistance in resolving this case." Pet. App. 13a n.8. That is so, the majority said, because "[n]o one argues that any of the student groups involved in the case before us is a public forum. To the contrary, the record clearly demonstrates that each is expressly devoted to advancing its own political and ideological causes." *Id.*

The majority's dismissal of these cases misconceives what a public forum is. An individual group that receives funding from the student activity fee is not itself a public forum. But neither is a speaker who mounts a Hyde Park soap-box. In that context, the portion of the park devoted to political activity is the public forum. By the same token, in this context the public forum is the "financial

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[11](...continued)
Regents, 204 N.W.2d 568, 570-71 (Neb. 1973) (upholding the use of mandatory fees to support both a student newspaper and a student speaker program); *Lace v. University of Vermont*, 303 A.2d 475, 479-80 (Vt. 1973) (rejecting a challenge to the use of mandatory student fees to fund a student newspaper, speaker's bureau, films, and sending student body president to a national student conference); *see also Veed v. Schwartzkopf*, 353 F. Supp. 149, 152 (D. Neb.), *aff'd*, 478 F.2d 1407 (8th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974) (rejecting constitutional challenge to the use of mandatory student fees to subsidize a student newspaper, a student association, and a speaker's program).

space" that the University has made available for student political expression.[12] Thus, the conclusion in *Hays County Guardian*, *Kania*, *Larson*, and *Lace* that mandatory fees may be used to subsidize a state university's creation of a public forum conflicts in principle with the decision below.

These public forum cases cannot be distinguished on the ground that they primarily concern funding student newspapers and speakers bureaus, rather than student political groups. As the Court of Appeals in *Kania* found, a student newspaper is a public forum because it "exposes 'the student body to various points of view on significant issues, and [allows] students to express themselves on those issues.'" 702 F.2d at 477 (citation omitted). Precisely the same is true for student political groups. As the California Court of Appeal recognized in this case, "the funding of the student groups promotes free expression by providing a forum for the exchange of ideas and the advocacy of divergent views." Pet. App. 114a; *see also* Pet. App. 86a. Indeed, the Fifth Circuit recently relied on *Carroll v. Blinken*'s public forum rationale in upholding funding of a

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[12]A public forum does not need to have a physical situs. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 801 (1985). In *Cornelius*, the Court decided that the Combined Federal Campaign, a charity drive for federal employees, was the public forum, rather than the federal workplace in which the campaign occurred. *Id.* Similarly, in this case, the "public forum" has been created by the University's decision to devote a portion of the student activity fee to subsidizing speech, including political speech.

This conclusion breaks no new ground. In *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court "found that a State University that had an express policy of making its meeting facilities available to registered student groups had created a public forum for their use." *Cornelius*, 473 U.S. at 802. Logically the same result follows if a university, instead of making meeting facilities available to student groups, provides the student groups with funds by which they can rent such facilities.

student newspaper through mandatory fees. *Hays County Guardian*, 969 F.2d at 123.[13]

The majority opinion below was wrong to reject the public forum holdings of cases such as *Hays County Guardian*, *Kania*, *Larson*, and *Lace*. Similarly, the decision below should have followed *Carroll v. Blinken*'s analysis of the educational interests served by funding student political groups, the importance of those interests to the University's educational mission, and whether those interests would be equally well served without funding on-campus student activity. This Court should grant certiorari to resolve the conflicts between the decision below and these cases.[14]

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[13]Moreover, the public forum rationale adopted by *Hays County Guardian*, *Kania*, *Larson*, and *Lace* is a better justification for funding student political groups than it is for funding a student newspaper. While the political groups funded by a student activity fee at a campus such as Berkeley will inevitably express opinions regarding a wide variety of issues from a multitude of viewpoints, a student newspaper may simply reflect the political and journalistic biases of its editors.

[14]In support of its holding, the majority below cited the Third Circuit's decision in *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986). However, that case "does not address the problem presented by a state university's allocation of a mandatory, non-refundable student activity fee" or whether a political or ideological student group "may be funded through the general activities fund as are other campus organizations representing diverse views." *Id.* at 1064. The fee invalidated in *Galda*, over a strong dissent, was a separate fee earmarked for a single organization "primarily devoted to changing conditions outside the University." *Id.* at 1065. In this situation, the court held that the University's justification for imposing a general activities fee–presenting a variety of ideas–did not apply. *Id.* at 1067. Even the majority below acknowledged, however, that "there is language in *Galda* suggesting that the mandatory funding of political groups might be acceptable if accomplished through a content-neutral process in which all groups on campus were free to compete . . . ." Pet. App. 17a. That is precisely the situation presented by this case.

B. The Decision Below Decides An Important Issue Of Constitutional Law In Conflict With The Decisions Of This Court.

This Court has never decided whether and how the principles set forth in *Abood v. Board of Education* and *Keller v. State Bar of California* apply in the context of a state university. That issue is an important one, which should be resolved by this Court.

1. As *Carroll* and the numerous other cases dealing with this subject indicate (*see* pp. 16-17, *supra*), public universities throughout the country provide support for on-campus political expression through the use of mandatory fees. The decision below threatens to bring that practice to a screeching halt. That decision gives each and every student the right to require that any disfavored group submit to a lengthy administrative proceeding to adjudicate whether its activities are more "ideological" than "educational," even though there may be dozens of such groups (whose activities may change from one year to the next) and even though the amount in controversy for each individual student will be no more than pennies. Because few universities will want to undertake this burden, as a practical matter the decision below sounds the death knell for using mandatory fees to create a forum for on-campus political expression.

2. No constitutional imperative requires so drastic a change in the collection and use of mandatory student fees. In applying *Abood* and *Keller* mechanically to this case, the court's majority opinion slights the differences between public universities, on the one hand, and labor unions and integrated bars, on the other. Labor unions play a defined role in a limited arena—the collective bargaining process—while integrated bars provide "specialized professional advice to those with the ultimate responsibility of governing the legal profession." *Keller*, 496 U.S. at 13. In contrast, a university exists to educate its students by, among other things, creating a "marketplace of ideas." Accordingly, a

university, unlike a labor union or integrated bar, is a public forum, at least for its students. *Widmar*, 454 U.S. at 267 n.5.

In both the agency fee cases and *Keller*, moreover, the compulsory fees or dues were being used to amplify only a single voice—that of the union in the agency fee cases and the State Bar in *Keller*. In such situations, dissenters have a cognizable First Amendment interest in not having their funds extracted to support a specific point of view with which they disagree.

In this case, by contrast, no such interests exist. The University does not compel the payment of student fees to support a single organization with a single point of view. To the contrary, Petitioners are indifferent as to whether the student activity fees are used to support any particular viewpoint. Indeed, as the abortion example indicates, fees are available to groups representing diametrically opposed points of view on the same issue. *See* p. 3, *supra*. Fee proceeds are available to such groups not because of any governmental purpose to enhance their particular parochial interests, but simply because these groups have sought to benefit from a content-neutral policy to make such fees available to all student groups.[15]

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[15]The failure of the decision below to recognize that funding diverse political views in and of itself furthers the University's educational mission warps the majority's constitutional analysis. For example, the majority opinion below objects to the fact that "students who favor abortion rights must pay to support the political activities of Berkeley Right to Life, a group opposed to abortion, [while] students opposed to abortion must subsidize groups such as Campus N.O.W. and Campus Abortion Rights Action League, which favor abortion rights." Pet. App. 19a. But the majority seems not to have noticed that encouraging an ongoing debate on the abortion issue by providing funds to such disparate points of view enhances the educational opportunities available to university students and thus benefits them all, regardless of what position they take on the abortion controversy. Since all students benefit from enhanced debate on this and other issues, all may be charged for it. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 221-22 (1977) (agency fee may be justified by removing the incentives employees would other-

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Abood and its progeny have never been applied when the government creates a public forum. That is so for good reason. Whenever the government creates a forum for expressive activity, and makes that forum open to part or all of the public on a content-neutral basis, views will be expressed which some find objectionable. Yet that fact does not give such individuals the right to prevent the government from using their money to create a public forum. For example, in *Buckley v. Valeo*, 424 U.S. 1 (1976), plaintiffs claimed that public financing of Presidential campaigns involved a "compulsion upon individuals to finance the dissemination of ideas with which they disagree[d]." *Id.* at 91 n.124. However, the Court summarily rejected this argument, holding in a single sentence that "[t]he scheme involve[d] no compulsion." *Id.*[16] Consequently, no citizen forced to subsidize a Hyde Park Speakers' Corner could refuse to contribute on the ground that he or she disagreed with some of the speeches made from the park's soapbox. Respondents stand in no better position.[17]

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[15](...continued)
wise have to become "free riders"). If the law were otherwise, any student could take advantage of the diversity of political viewpoints expressed on a university campus without being compelled to pay the cost of providing such a public forum.

[16]The Court could have relied on the voluntariness of the taxpayer check-off to the election financing fund to conclude that "no compulsion" existed. But it did not do so. Instead, the Court made clear that its conclusion would have been the same had the election financing been appropriated by Congress out of general revenues. "The . . . check-off is simply the means by which Congress determines the amount of its appropriation." *Id.*

[17]Two Courts of Appeals have held that the constitutional burden on dissenters' First Amendment rights is not lessened by the fact that they are forced to contribute to a variety of groups. *Carroll*, 957 F.2d at 998; *Galda v. Rutgers*, 772 F.2d at 1067. But none of these cases attempt to square this holding with the public forum analysis presented above.

3. Even if *Abood* applies, the majority opinion below unjustifiably increased the burden which Petitioners had to carry in order to justify using the student activity fee for student political activities. This Court has never expressly articulated the standard that applies to a substantive claim that fees are being imposed unconstitutionally. Since the decision below and *Carroll v. Blinken* conflict on just this point (*see* pp. 13-14, *supra*), this case provides an excellent opportunity to decide this issue once and for all.

Such guidance as the Court has provided, however, indicates that the California Supreme Court was quite wrong in applying "strict scrutiny." *Abood* and *Keller* state only that the governmental interests furthered by a compulsory fee be "important" (*Abood*, 431 U.S. at 222, 225) or "substantial" (*Keller*, 496 U.S. at 13), not "compelling," as "strict scrutiny" requires. Similarly, and of even greater importance, neither *Abood* nor the other agency shop cases nor *Keller* requires a showing that no less onerous alternatives exist to imposing a mandatory fee; instead, they require only that expenditure of the mandatory fee be "necessarily *or reasonably incurred* for the purpose of" effectuating the interests for which the fee is adopted. *Keller*, 495 U.S. at 14 (emphasis added). As the Second Circuit held in *Carroll v. Blinken*, this test can be met simply by showing that these interests "would be served less effectively absent the activity fee distribution . . . ." 957 F.2d at 1001. It does not require the defendant to show that there are no conceivable alternatives to the challenged policy that could be envisioned after the fact by a creative judge. *See* note 10, *supra*.[18]

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[18]In invoking strict scrutiny, the majority opinion below cited *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). But that case deals only with the procedure necessary to protect dissenters' rights once a court has found that mandatory fees are being used for unconstitutional purposes. It does not deal with the standard of review necessary to determine whether a violation of the constitution exists in the first instance.

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4. Moreover, the standard adopted by the majority below for distinguishing between groups that may be funded with mandatory fees and groups whose funding is impermissible subverts the very constitutional provision it purports to protect. Once a university creates a public forum, it may not deny access to that forum on the basis of a student group's political ideas. *Healy v. James*, 408 U.S. 169, 187-88 (1972). For that reason, the lower federal courts have prohibited universities from denying funding to student political groups because of the views they express. *Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361, 367 (8th Cir. 1988). Yet the majority opinion below requires the university and the courts to make such content-based determinations in order to distinguish between permissible and impermissible recipients of mandatory fees.

The intrusive inquiry mandated by the decision below cannot be justified on the ground that *Abood* and its progeny require such content-based determinations. In those cases, the Court has distinguished between speech that can be funded with compelled fees and speech that may not be so funded on the basis of the speech's subject matter. *See, e.g., Keller*, 496 U.S. at 15-16; *Ellis v. Railway Clerks*, 466 U.S. 435, 450-51 (1984). In such cases, the Court compares the subject matter of the proposed speech with the purposes for which the compelled fee is levied to see if the latter justifies the former. That determination does *not* turn on the speech's viewpoint, the manner in which the

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[18](...continued)
Moreover, to the extent *Hudson* assumes that a requirement of "narrow tailoring" subsumes a "less restrictive alternative analysis" (*id.* at 303 & n.11), it has been overtaken by the Court's subsequent holding in *Ward v. Rock Against Racism* that a requirement of "narrow tailoring" and "strict scrutiny" are not the same. *See* note 10, *supra*.

communication addresses the particular subject matter, or the subjective value of the proposed speech.[19]

That determination is leagues apart from the wholly subjective inquiries mandated by the decision below. In attempting to determine precisely when a "group's dedication to achieving its political or ideological goals . . . begins to outweigh any legitimate claim it may have to be educating students on the University's behalf" (Pet. App. 12a), the Regents and the courts will inevitably have to make determinations that are guided neither by objective criteria nor by subjective standards that are judicially or administratively manageable. Will Petitioners have to make individual judgments concerning the educational vs. ideological content of each movie presented by a student group? Will they have to make similar judgments for forums, leaflets, and rallies? Such inquires are the logical—indeed, the inevitable—result of the California Supreme Court's majority opinion. *See* Pet. App. 33a, 46a.

This Court's cases forbid Petitioners from making such distinctions. Because both the tract and the treatise contribute to political debate, the First Amendment protects "'vigorous advocacy' no less than 'abstract discussion.'" *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964). Consequently, the decision errs in compelling Petitioners to distinguish between the two, in the context of a dedicated public forum, for each political group that receives student activity fee funding. The Court should grant review to correct the errors in the decision below and prevent Respondents' misuse of the First Amendment from impairing the

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[19]For example, under *Keller*, the State Bar of California may not use mandatory bar dues to take a position on a gun control or nuclear freeze initiative regardless of whether it supports or opposes the particular initiative in question. Conversely, under *Ellis v. Railway Clerks*, a labor union may use compelled dues to defray the expenses of running newspaper articles about collective bargaining, strikes, negotiations, etc., no matter how one-sided, tendentious, or inflammatory is its treatment of these subjects. *Id.* at 450-51.

University's ability to create a public forum that it believes is vital to fulfilling its educational mission.

II.

THE CALIFORNIA SUPREME COURT'S HOLDING THAT MANDATORY FEE PROCEEDS MAY NOT BE USED TO SUPPORT POLITICAL SPEECH BY A STUDENT GOVERNMENT ERRONEOUSLY DECIDES AN IMPORTANT ISSUE OF LAW.

The California Supreme Court held that mandatory fee proceeds may not be used to support the ASUC's own political activities unless such funding satisfies strict scrutiny. Pet. App. 30a. But the ASUC Senate is constitutionally indistinguishable from the other groups whose funding is discussed in Part I. Like them, it is a voluntary student association. Like them, it takes positions on university-related, local, state and national issues. And like them, it is funded through the student activity fee to further the University's educational mission. The reasons given in Part I why the Court should grant review of the "student groups" issue are equally applicable to the "ASUC Senate" issue.

Petitioners believe that "student government [is] an important part of the university's educational function in that it serves to teach students about government; it enables students to participate in governmental decision-making; and it exposes students to the presentation of diverse views." Pet. App. 72a. This belief is not unique to the University of California; indeed, Chief Justice Burger has written that "[p]art of the educational experience of every college student should be an experience in responsible self-government . . . ." *Healy v. James*, 408 U.S. 169, 195 (1972) (Burger, C.J., concurring). Providing such an experience is a substantial—indeed, a compelling—governmental interest. *Cf. Regents of the University of California v. Bakke*, 438 U.S. at 313 (Powell, J.) ("it is not too much to say that the 'nation's future depends upon leaders trained through wide

exposure' to the ideas and mores of students as diverse as this Nation of many peoples").[20]

For these reasons, student governments are a familiar part of the American university landscape. But few such governments are financially self-sufficient. Most depend on some form of subsidy by the university: either a mandatory student activity fee or the provision of meeting and office space, telephones, printing, etc. Under the decision below, such support will become constitutionally suspect the minute a student government ventures into the "political" arena. The end result is obvious: political debate will be inhibited, not encouraged.[21]

The First Amendment does not require this result. Fostering the expression of political views by a democratically elected student government unquestionably is germane to the University's educational mission. Moreover, the incremental burden on Respondents is minimal.

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[20]The majority below grudgingly acknowledges that "the ASUC Senate's practices of taking and publicizing positions on political issues may have educational value for those few students who are involved." Pet. App. 28a. But the debating and passing of a resolution may promote discussion and debate throughout the campus at large. Moreover, most curricular or extra-curricular activities, such as a particular class or student group, directly benefit only a small minority of the thousands of students at a large university like Berkeley. Yet that does not diminish the educational value of such activities.

[21]The majority's holding that the ASUC Senate must satisfy strict scrutiny whenever it uses funds for political speech is not limited to speech that is unrelated to University issues. For that reason, the decision below will inhibit student governments from taking positions on any university-related issue that might arguably be deemed "political," such as whether universities should divest from (or reinvest in) South Africa, whether campuses should adopt "hate speech" codes, etc. Such an inhibition deprives student government of a central purpose for existence. Moreover, the university itself—as opposed to its students—has an obvious interest in providing an organized and democratic means for the expression of student views on university-related issues. *See* RT 950-51, 1066-67. This ensures that students will not need to engage in disruptive behavior to make their voices heard. RT 1067.

They may be compelled to pay the cost of creating a public forum for expressive activities through a mandatory student activity fee. *See* Part I(B), *supra*. Funding political expression by one additional group—the ASUC Senate—does not significantly add to their burden.[22]

III.

THE CALIFORNIA SUPREME COURT'S HOLDING THAT MANDATORY FEE PROCEEDS MAY NOT BE USED TO SUPPORT LOBBYING ON UNIVERSITY RELATED ISSUES ERRONEOUSLY DECIDES AN IMPORTANT ISSUE OF LAW.

In *Lehnert v. Ferris Faculty Ass'n*, --U.S.--, 114 L. Ed. 2d 572 (1991), this Court held that a union could use agency shop fees for lobbying relating to the ratification and implementation of its collective bargaining agreements, but not for purposes less directly related to the union's collective bargaining responsibilities. But while the connection between general lobbying activities and a union's collective bargaining responsibilities is "too attenuated to compel support by objecting employees" (114 L. Ed. 2d at 590), there is no "germaneness" problem here. University rules prohibit mandatory fees from being spent on issues that do

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[22]Although the decision below contemplates further judicial proceedings on the issue of whether mandatory fees can be used to pay for the ASUC Senate's political activities, this aspect of the decision is final under 28 U.S.C. §1257(a). "Adjudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits application of an exception to the general finality rule." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 55 (1989). Moreover, for the reasons discussed in text, the "ASUC Senate" issue is constitutionally indistinguishable from the issue of funding student political activity generally, and the California Supreme Court's ruling on that issue is unquestionably final. If the decision below stands, Petitioners will have to adopt a check-off and a *Hudson*-type refund procedure for the fee proceeds devoted to student groups and lobbying. Pet. App. 22a-23a, 27a. Yet this procedure would be quite unnecessary if Petitioners ultimately prevailed in this Court after further judicial proceedings on the "ASUC Senate" issue.

not relate to the University or its students. RT 362, 384, 1049, 1083-84.[23]

Moreover, the university's educational mission is not as circumscribed as a union's collective bargaining responsibilities (*see* pp. 20-21, *supra*), and the lobbying expenses at issue here directly advance the University's educational mission. Both the majority below and the dissent conceded that lobbying provides educational benefits to those involved. Pet. App. 27a, 51a. But the majority erred in thinking that lobbying benefitted only "a few student lobbyists" (Pet. App. 27a) and the dissent made a similar mistake in arguing that off-campus speech "does not contribute to the campus discussion of ideas . . . ." Pet. App. 51a. Lobbying cannot be divorced from on-campus political debate. The student lobbies stimulate discussion on campus by urging students to contact legislators (RT 355-56, 855); sponsoring on-campus debates on critical issues (RT 363-64, 479); conducting research on-campus to support positions taken by the lobbyists (RT 478); and encouraging students to participate in local boards and commissions. RT 427-28, 473. Once lobbying occurs, the lobbies publicize their positions on-campus by advertising in the student newspaper (RT 469) and distributing brochures to students. RT 470. The educational benefits lobbying provides are thus not limited to the lobbyists themselves.

The lobbying issue is closely related to the other issues this case presents. It would make little sense for this Court to set forth the constitutional standards applicable to the use of student fees to fund on-campus speech but to

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[23]This fact also differentiates this case from *Carroll v. Blinken*, 957 F.2d 991 (2d Cir, 1991), *cert. denied*, –U.S.–, 121 L. Ed. 2d 224 (1992), and *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986). Both of those cases concerned funding of a "Public Interest Research Group," which lobbied on a wide variety of issues, many of which were totally unrelated to the university or its students. *See Carroll*, 957 F.2d at 994 (issues ranged from rates set by local area taxicabs to arms control).

leave in place the California Supreme Court's decision barring the use of such funds for off-campus lobbying. The two issues are obviously related, and should be adjudicated together.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: July 14, 1993. Respectfully,

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No. 93-82

Supreme Court, U.S.
FILED
JUL 14 1993
OFFICE OF THE CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1993

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ASSOCIATED STUDENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,
Petitioners,

vs.

AVERELL SMITH, ARLO HALE SMITH, ADLAI SMITH, BRAD SPARKS, JIMMY HOM, EMILY TAYLOR, ALEXA SMITH, THOMAS KISTLER,
Respondents.

On Petition for Writ of Certiorari to the California Supreme Court

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Table of Contents

	Page
California Supreme Court's Opinion	1a
California Supreme Court's Order Denying Petitions For Rehearing	64a
Modification of California Supreme Court's Opinion	65a
California Supreme Court's Order Granting Review of Court of Appeal's Second Opinion	67a
Court of Appeal's Second Opinion	68a
California Supreme Court's Order Vacating and Remanding Court of Appeal's First Decision	96a
Court of Appeal's First Opinion	97a
Superior Court's Statement of Decision	123a
Superior Court's Judgment	144a

SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

AVERELL SMITH ET AL.,	S006588
Plaintiffs and Appellants,	(Court of Appeal) No. A020533)
v.	(Superior Court Nos. 0519977 & 533997)
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL.,	
Defendants and Respondents.	
ASSOCIATED STUDENTS OF THE UNIVERSITY OF CALIFORNIA,	
Plaintiff,	
v.	
THE SMALL CLAIMS COURT FOR THE BERKELEY-ALBANY JUDICIAL DISTRICT OF ALAMEDA COUNTY,	
Defendant;	
BRAD SPARKS ET AL.,	
Real Parties in Interest.	

Students at the Berkeley campus of the University of California are required to pay an activities fee. Part of the income from the fee is used to support student groups that pursue political and ideological causes. The student plaintiffs in this case object both to the imposition of the fee and to the manner in which it is used.

We reject plaintiffs' challenge to the imposition of the fee. The authority to levy a student activities fee is well within the broad powers of self-governance that the citizens of California have granted the University's Regents under the state Constitution.

The Regents' freedom to govern the University, however, is not the only freedom at stake in this case. Also at stake is the freedom of students not to be compelled and coerced to subsidize political and ideological causes. The dissenting opinion misleadingly asserts that this case is about the "dissemination of controversial ideas" (dis. opn. of Arabian, J., *post*, at p. _____ [typed dis. opn. at p. 1]) and wrongly accuses the majority of somehow restricting speech. In fact, the case has nothing to do with restrictions on speech. It goes without saying that all students are free to organize, to promote their ideas, and to seek by all legal means to persuade others that their views are correct. Moreover, the Regents may continue to fund student political activities through the fees of students who do not object. However, the constitutional guaranties of free speech and association do not permit the state to make speech a matter of compulsion and coercion. As the present system of funding student activities has that effect, it cannot be continued without affording dissenting students an appropriate remedy.

At the heart of the dissenting opinion is a frank proposal to sacrifice students' constitutional right not to be compelled to support political causes in order to teach them about the "fundamental republican virtues on which this nation was founded." (Dis. opn. of Arabian, J., *post*, at

p. ___ [typed dis. opn. at p. 3].) The irony of that proposal speaks for itself.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs in this action were students at the University of California at Berkeley (University), or taxpayers, during 1981. Defendants are the Regents of the University of California (Regents), the Associated Students of the University of California (ASUC), and various officers of the University. The Regents govern the University pursuant to authority granted by the state Constitution. (Cal. Const., art. IX, § 9.) The ASUC is the organization authorized by the Regents to administer student government and student extracurricular affairs.

Since 1955, every student at the University has paid a mandatory, nonrefundable fee to support the ASUC each academic period as a condition of enrollment. For many years, payment of the fee entailed automatic membership in the ASUC. Shortly after this litigation began, however, the University changed its procedures to permit each student to accept or to decline ASUC membership. Payment of the fee remains mandatory.

The Regents transfer most of the income from the mandatory fee to the ASUC. In 1982, when this case was tried, the amount of the fee was $12.50 per student per quarter. The total amount collected from students and transferred by the Regents to the ASUC in the 1981-1982 academic year was $607,635. The ASUC's total expenditures for the same period were $1,016,569. The difference between the income from the mandatory fee and the ASUC's total expenditures is attributable to the ASUC's many business enterprises, which include the Student Union Building, a bookstore, and a ski lodge. In its operations the ASUC employs a full-time staff of over 85 persons and a part-time staff of over 250.

The ASUC uses its income, including the proceeds of the mandatory fee, to support a wide variety of activities

In addition to student government. The ASUC is, for example, active in politics through the ASUC Senate, the governing body of 30 elected student representatives. Besides administering student affairs, the ASUC Senate debates and passes resolutions on local, state, and national issues. Issues on which the ASUC Senate has taken positions include, for example, gay and lesbian rights, the proposed Equal Rights Amendment, gun control, the reelection of a particular United States Representative, a municipal initiative to legalize marijuana, and the treatment of political prisoners in foreign countries.

The ASUC also subsidizes lobbying by two affiliated groups, the University of California Lobby and the ASUC Municipal Lobby. These groups seek to influence legislation pending before the state and municipal governments, respectively. Through the former, the ASUC has lobbied the state Legislature in favor of using registration fees to fund abortions, against rent discrimination, against budget cuts for the University, and in favor of mandatory student fees. Through the latter, the ASUC has lobbied the City of Berkeley on a nuclear freeze initiative, public transportation fares, city investment policy, zoning, and rent control, and has endorsed student candidates for municipal office.

In addition to its own activities, the ASUC also uses income from mandatory fees to subsidize approximately 150 student activity groups. Any four students at the University may form such a group and register it with the University. All registered groups may, but need not, request funding from the ASUC. Student groups pursue diverse interests, including academic subjects, culture, sports, games, and politics. To obtain funding, a student group submits a budget to the ASUC Finance Committee for review, which forwards its recommendation to the ASUC Senate for approval. Upon approval, a student group is eligible to receive reimbursement for actual expenses as incurred. The ASUC's rules permit reimbursement for 11 categories of

expenses: "(1) personal services, (2) stationery and supplies, (3) telephone, (4) travel, (5) dues and subscriptions, (6) postage, (7) equipment rental, (8) advertising, (9) programs and printing, (10) facilities rental, and (11) other."

Most of the registered student groups are devoted to academic, cultural, or recreational pursuits. The Physics Students Society, the Spanish Club, the Cal Ski Club, and the Chess Club are random, typical examples. However, other groups pursue frankly political or ideological goals. At trial, plaintiffs objected to the ASUC's funding of 14 such groups: Amnesty International; Berkeley Students for Peace; Campus N.O.W. (National Organization for Women); Campus Abortion Rights Action League; Gay and Lesbian League; Progressive Student Organization; REAP (Radical Education and Action project); Spartacus Youth League; Students Against Intervention in El Salvador; Students for Economic Democracy; UC Berkeley Feminist Alliance and Women Organized Against Sexual Harassment; UC Sierra Club; Conservation and Natural Resources Organization; and Greenpeace Berkeley. Some of these organizations are affiliated with state, national, or international organizations.

The procedural history of this action, insofar as it relates to the issues before us, is as follows: On April 16, 1979, plaintiffs Averell Smith, Marina Trepetin, Arlo Hale Smith, and Adlai Smith filed suit in the Superior Court of Alameda County against the Regents, the ASUC, and certain individual officers of the University. In their action, plaintiffs challenged the Regents' collection and use of the mandatory fee as violating the First Amendment to the United States Constitution,[1] article I, section 2, subdivision (a),[2] article I, section 3,[3] and article IX, section 9,

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[1]"Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

[2]"Every person may freely speak, write and publish his or her (continued...)

subdivision (f),[4] of the California Constitution, and various other state constitutional and statutory provisions. Plaintiffs sought declaratory, injunctive, and all other appropriate relief. On May 23, 1980, five additional student plaintiffs (Brad Sparks, Jimmy Hom, Emily Taylor, Alexa Smith, and Thomas Kistler) filed individual actions in the Berkeley-Albany Small Claims Court seeking refunds of mandatory fees. All actions were subsequently consolidated by stipulation in the superior court.

On March 25, 1982, the superior court summarily adjudicated that the Regents' collection of the mandatory fee was legal. The court then tried, without a jury, plaintiffs' claims regarding the use of the fee. The court expressly found that "there ha[d] been isolated instances in the past wherein University and ASUC Rule[s] and Regulations ha[d] been violated in areas involving partisan political activities, ballot measure positions and alleged misuse of [the] University['s] name in connection with student activities . . . ." Nevertheless, the court entered judgment for defendants. The Court of Appeal affirmed. We granted review and deferred briefing pending the United States Supreme Court's disposition of *Keller v. State Bar* (1990) 496 U.S. 1, which involved a challenge to the State Bar of California's use of mandatory dues to support political and ideological activities. We then remanded the case for reconsideration in light of the high court's opinion. When the Court of Appeal once again affirmed, we granted review.

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[2](...continued)
sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of the speech or press."

[3]"The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good."

[4]". . . The university shall be entirely independent of all political or sectarian influence and kept free therefrom in the appointment of its regents and in the administration of its affairs . . . ."

II. DISCUSSION

A. Collection of the Mandatory Fee.

Plaintiffs Kistler and Taylor contend that the Regents do not have sufficient authority to collect a mandatory student activities fee. The contention lacks merit. The California Constitution expressly invests the Regents with "full powers of organization and government" over the University. (Cal. Const., art. IX, § 9, subd. (a).) This general grant of power, which as been described as giving the Regents "virtual autonomy in self-governance" (*Regents of University of California v. City of Santa Monica* (1978) 77 Cal. App. 3d 130, 135), is plainly adequate to permit the Regents to levy a student activities fee in the absence of a constitutional or statutory prohibition.

Plaintiffs suggest that language with the effect of prohibiting the collection of a mandatory fee can be found in several authorities, namely article IX, section 9, subdivision (f), of the state Constitution;[5] section 13 of the Organic Act establishing the University (Stats. 1867-1868, ch. CCXLIV, § 13, p. 253-254);[6] and our decision in *Stanson v. Mott* (1976) 17 Cal. 3d 206, 213-223. The constitutional and statutory provisions just cited declare, in essence, that the University shall be kept free of political and sectarian influence. *Stanson v. Mott, supra,* held that a state official acted improperly by spending public funds to campaign in favor of a ballot proposition. While these authorities might support an argument against some of the uses to which the fee has been put, they do not appear to affect the Regents' power to collect a fee, assuming its use is proper.

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[5]See footnote 4, *ante*.

[6]"[N]o sectarian, political or partisan test shall ever be allowed or exercised in the appointment of Regents, or in the election of professors, teachers, or other officers of the University, or in the admission of students thereto, or for any purpose whatsoever . . . ." (*Id.*, at p. 254.)

We thus turn to plaintiffs' claims regarding the use of the fee.

B. ASUC Support of Political and Ideological Groups.

Plaintiffs contend that the ASUC uses income from the mandatory fee in several ways that violate their rights to freedom of speech and association. We consider first the use of such fees to subsidize student groups devoted to political and ideological causes.

This case involves two important principles. The first is that the government may not compel a person to contribute money to support political or ideological causes. (See, e.g., *Keller v. State Bar of California, supra,* 496 U.S. at pp. 9-10 (*Keller*); *Abood v. Detroit Board of Education* (1977) 431 U.S. 209, 234-235 (*Abood*).) Such contributions are a form of speech, and compelled speech offends the First Amendment,[7] just as do restrictions on speech. (E.g., *Keller, supra,* 496 U.S. at pp. 9-10; *Abood, supra,* 431 U.S. at pp. 234-235, & 235 fn. 31; *Miami Herald Publishing Co. v. Tornillo* (1974) 418 U.S. 241, 247-258 [state may not compel a newspaper to print a political candidate's reply to an editorial]; *Torcaso v. Watkins* (1961) 367 U.S. 488, 489-496 [state may not compel civil servants to affirm a belief in God]; *West Virginia Board of Education v. Barnette* (1943) 319 U.S. 624, 630-642 [state may not compel students to salute the flag].) Courts have often stressed this principle by repeating Thomas Jefferson's view that "'"to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."'" (Brant, James Madison: The Nationalist (1948) p. 354, as

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[7]The state Constitution also guarantees speech, associational, and political rights in comparable, but independent, provisions. (Cal. Const., art. I, § 2, subd. (a); art. I, § 3; see *id.*, art. I, § 24 ["Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution"].) Because we find that plaintiffs are entitled to relief on other grounds, we need not address the effect of these provisions.

quoted in *Abood, supra,* 431 U.S. at p. 235 fn. 31; see also *Keller, supra,* 431 U.S. at p. 10; *Chicago Teachers Union v. Hudson* (1986) 475 U.S. 292, 305 fn. 15 (Hudson).)

The second principle is that the Regents, to be effective, must have considerable discretion to determine how best to carry out the University's educational mission. Indeed, we have said that "the power of the Regents to operate, control, and administer the University is virtually exclusive." (*Regents of University of California v. Superior Court* (1970) 3 Cal. 3d 529, 540, internal quotation marks omitted; see also *San Francisco Labor Council v. Regents of University of California* (1980) 26 Cal. 3d 785, 788.)

These principles conflict in the case before us. Plaintiffs, invoking their constitutional right not to be compelled to speak, argue that the use of mandatory fees to subsidize student political groups impermissibly burdens that right. The Regents, relying on their authority to define the University's educational mission, acknowledge the burden on plaintiffs' rights but argue that student political activity offers educational benefits that justify the burden.

Our analysis begins with a line of high court decisions that arose in the context of agency-shop agreements. Under these decisions, a state may compel employees who obtain the benefits of a union's collective bargaining efforts to pay service fees to the union, even though such employees may choose not to join. (*Abood, supra,* 431 U.S. at pp. 217-223; see also *Hudson, supra,* 475 U.S. at p. 301.) The Court has explained this result as justified by the state's interest in facilitating collective bargaining and preventing "free riders." (*Abood, supra,* 431 U.S. p. 222; see also *id.*, at pp. 220-221.) However, the constitutional prohibition against compelled speech limits the uses to which a mandatory fee may be put: When the state does compel nonmembers to support a union financially, the nonmembers may prevent the union from using their contributions to fund the expression of political and ideological views unrelated to collective bargaining.

Id., at p. 234; see also *Hudson, supra,* 475 U.S. at pp. 301-302.)

Because the use of a mandatory fee implicates freedom of association, strict scrutiny applies. As the high court reiterated in *Hudson, supra,* "[i]nfringements on freedom of association 'may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'" (475 U.S. at p. 303 fn. 11, quoting *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 623.) Thus, even when the government has a sufficiently compelling interest to require a person to subsidize an organization against his or her will, the resulting burden on freedom of association "requires that the procedure be carefully tailored to minimize the infringement." (*Hudson, supra,* 475 U.S. at p. 303.)

The principle that underlies the agency-shop decisions took sharper focus in *Keller, supra,* 496 U.S. 1, which concerned the mandatory payment of dues by lawyers to a bar association. The plaintiff lawyers objected to the bar's use of dues to fund lobbying on issues of general social concern that had little, if anything, to do with the practice of law, such as gun control, abortion, and prayer in public schools. The bar defended its lobbying as a permissible exercise of its statutory authority to "aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice." (*Id.*, at p. 15, internal quotation marks omitted.)

The high court rejected the bar's argument. In so doing, the court made clear that the use of mandatory contributions must be "germane," not simply to any purpose the organization chooses to declare for itself, but "to the purpose for which compelled association was justified" as a matter of constitutional law. (*Keller, supra,* 496 U.S. at p. 13, citing *Abood, supra,* 431 U.S. 209; see *Abood, supra,* at pp. 219, 235.) In other words, the existence of a compelling interest sometimes permits the state to

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While *Keller* and *Abood* hold that activities supported by mandatory contributions must be "germane" to the constitutionally relevant function, it does not follow, as the Regents argue, that everything "germane" is automatically permissible without the need for further inquiry. *Keller* and *Abood* involved much lighter burdens on speech and associational rights than those at issue here. A state bar's regulatory function, as in *Keller*, and a labor union's collective bargaining function, as in *Abood*, can be narrowly defined. Thus, to be compelled to pay for activities "germane" to those functions does not substantially burden an unwilling supporter's speech and associational rights. While the unwilling supporter may receive unwanted professional or economic assistance, he or she remains free not to speak or to support others' speech on political and ideological issues. In contrast, the University's educational function is extremely broad; it potentially encompasses all of life. By recognizing that student political activity can be "germane" to education we run the risk of sanctioning a much greater burden on speech and associational rights than the high court necessarily contemplated when it used that term. (*Keller, supra*, 496 U.S. at pp. 13-14, citing *Abood, supra*, 431 U.S. 209; see also *Abood, supra*, at pp. 219, 235.)

The solution to this problem is to set a rational limit on the use of mandatory fees. We can do this by recognizing what is obviously true, namely that a group's dedication to achieving its political or ideological goals, at some point, begins to outweigh any legitimate claim it may have to be educating students on the University's behalf. To fund such a group through mandatory fees will usually constitute more of a burden on dissenting students' speech and associational rights than is necessary to achieve any significant educational goal. The University can teach civics in other ways that involve a lesser burden on those rights, or no burden at all.

Indeed, this is the approach that courts have followed in the two cases that are fairly closely on point.

(*Carroll v. Blinken* (2d Cir. 1992) 957 F.2d 991, cert. den. (1992) __ U.S. __ [121 L.Ed.2d 224]; *Galda v. Rutgers* (3d Cir. 1985) 772 F.2d 1060, cert. den. (1986) 475 U.S. 1065.)[8]

In *Carroll v. Blinken, supra*, 957 F.2d 991 (*Carroll*), students at the State University of New York (SUNY) at Albany challenged the use of a portion of their mandatory student activity fee to fund the New York Public Interest Research Group, Inc. (NYPIRG). NYPIRG, a statewide organization with chapters on 19 SUNY campuses, described itself as a "'nonpartisan research and advocacy organization directed by New York State college and university students.'" (*Id.*, at pp. 993-994.) NYPIRG spent money both on and off campus. On campus, NYPIRG financed research projects by students and sponsored debates, symposiums, and professors' fora on issues of public interest. Off campus, NYPIRG employed 60 full-time professional staff members to lobby the state government

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[8]Decisions upholding the use of mandatory fees to create public fora, such as student newspapers and speakers' bureaus, offer little assistance in resolving this case. (E.g., *Kania v. Fordham* (4th Cir. 1983) 702 F.2d 475; *Arrington v. Taylor* (M.D.N.C. 1974) 380 F. Supp. 1348; *Veed v. Schwartzkopf* (D.Neb. 1973) 353 F. Supp. 149.) No one argues that any of the student groups involved in the case before us is a public forum. To the contrary, the record clearly demonstrates that each is expressly devoted to advancing its own political and ideological causes.

Other decisions cited by the dissent to show that students may be compelled to fund political and ideological causes (*Lace v. University of Vermont* (Vt. 1973) 303 A.2d 475; *Good v. Associated Students of Univ. of Washington* (Wash. 1975) 542 P.2d 762) do little to support that position. The court in *Good* held that a student association receiving mandatory fees could *not* "become a vehicle for the promotion of one particular viewpoint, political, social, economic or religious," and remanded for evidentiary proceedings to determine whether the university had failed to enforce its own guidelines on the use of funds. (*Good, supra*, 542 P.2d at pp. 769-770.) The *Lace* court rejected a challenge to mandatory fees, but only because the record did not show that the student plaintiffs had "either pled or proved that they were required through the assessment of the mandatory student activities fee to finance the promotion of religious, political, or philosophical causes." (*Lace, supra*, 303 A.2d at p. 479.)

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(*Id.*, at p. 994.)

The court in *Carroll* identified the limits of mandatory funding by balancing the educational benefits f that NYPIRG offered to students against the infringement s of the dissenting students' right not to be compelled to t subsidize NYPIRG's political activities. The court frankly o recognized the infringement. To quote the opinion, the y dissenting students' "right to be free from compelled speech e suffers when NYPIRG uses student funds to raise issues on h campus, organize the community and lobby the legislature n in pursuit of 'economic and social justice.'" (957 F.2d at e p. 999.) The court also recognized that these intrusions t must be "'narrowly drawn to avoid unnecessary intrusions s on freedom of expression'" and justified by the state. (*Ibid.*, n quoting *Schad v. Mount Ephraim* (1981) 452 U.S. 61, 69 fn. 7.) ; However, the court found that NYPIRG offered benefits on) campus that were "substantial enough to justify the n infringement . . . ." (*Carroll, supra,* 957 F.2d at p. 1001.) e These benefits consisted of promoting extracurricular life,) transmitting skills and civic duty, and stimulating energetic ; campus debate. (*Ibid.*) c

The *Carroll* court reached a different conclusion regarding NYPIRG's off-campus activities. Reasoning, as n before, that "even incidental burdens on speech [must] be s 'narrowly drawn'" (957 F.2d at p. 1002, quoting *Schad v. Mt.* e *Ephraim, supra,* 452 U.S. at p. 69 fn. 7; cf. *id.* at p. 999), the court concluded that the purported educational benefits e "vanish when NYPIRG money is spent in the halls of the s state legislature . . . ." (957 F.2d at p. 1002.) The e university's interests, the court reasoned, "are still, after all e those of the university and its community, not that of an independent statewide organization." *Ibid.* n

There is language in *Carroll* that the Regents interpret as suggesting that the standard of review in cases s such as this is more relaxed than the strict scrutiny standard s that courts typically apply in cases involving burdens on d n

speech and associational rights. However, we do not read the Second Circuit's opinion that way. The court wrote, citing *United States v. Albertini* (1985) 472 U.S. 675 (*Albertini*), that it would "look to see whether the [challenged] regulation 'promotes a substantial government interest that would be achieved less effectively absent the regulation.'" (*Carroll, supra,* 957 F.2d at p. 999, quoting *Albertini, supra,* 472 U.S. at p. 689.) In context, however, it is clear that the high court in *Albertini* did not use this language to announce a relaxed standard of review. In that case the Court upheld, as applied to a person protesting nuclear weapons, a law making it a criminal offense to reenter a military base after having been ordered not to do so by the commander. The high court did use the language quoted in *Carroll,* but the Court also emphasized that even "an incidental burden on speech [must be] no greater than is essential . . . ." (*Albertini, supra,* 472 U.S. at p. 689.) Reading the quoted language in context, it is evident that the high court merely applied a version of the strict scrutiny test that courts traditionally apply in symbolic conduct cases.[9]

Whatever the import of the *Carroll* court's reference to *Albertini* may be, what matters for our purposes is this: The Second Circuit expressly and repeatedly recognized that the defendants had to show that SUNY's mandatory

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[9]"[A]n incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien,* so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."(*Albertini, supra,* 472 U.S. at p. 689.)

In *United States v. O'Brien* (1968) 391 U.S. 367, to which the *Albertini* opinion refers, the high court applied strict scrutiny to a symbolic conduct case. "Application of a facially neutral regulation that incidentally burdens speech satisfies the First Amendment if it 'furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'" (*Albertini, supra,* 472 U.S. at pp. 687-688, quoting *United States v. O'Brien, supra,* 391 U.S. at p. 377.)

funding rule was "'narrowly drawn to avoid unnecessary intrusion'" on constitutional rights. (*Carroll, supra,* 957 F.2d at pp. 999, 1002, quoting *Schad v. Mt. Ephraim, supra,* 452 U.S. at p. 69 fn. 7.) This, in essence, is strict scrutiny, the same standard that the high court invoked in *Hudson* (*supra,* 475 U.S. at p. 303 fn. 11).

In *Galda v. Rutgers, supra,* 772 F.2d 1060 (*Galda*), the court applied the same test to a similar organization but reached a different conclusion. The student plaintiffs at Rutgers, the State University of New Jersey, objected to the use of a mandatory fee to support the New Jersey Public Interest Research Group (New Jersey PIRG). New Jersey PIRG, like the organization involved in *Carroll, supra,* 957 F.2d 991, was a statewide organization with student members on many campuses. New Jersey PIRG lobbied the federal and state governments on various matters of social interest, including the proposed Equal Rights Amendment, nuclear weapons, and the environment. New Jersey PIRG also provided internships for students, who received academic credit on campus for the work they performed. (772 F.2d at p. 1061.)

The court in *Galda* considered it important that New Jersey PIRG was a statewide organization rather than one consisting solely of Rutgers students. The court also attributed significance to the particular funding mechanism employed: Students voted periodically to support New Jersey PIRG through a separate, mandatory fee rather than through the general student activities fund. For these reasons, the court felt that it was unnecessary to "address the problem presented by a state university's allocation of a mandatory non-refundable student activity fee" or the question whether "an organization with PIRG's philosophic outlook may be funded though the general activities fund as are other campus organizations representing diverse views." (772 F.2d at p. 1064.)

The particular facts of the *Galda* case undoubtedly determined its outcome, but there is nothing in the Third Circuit's approach that prevents its application to on-

campus student groups. In essence, the court inquired whether mandatory funding of New Jersey PIRG was necessary to achieve the university's educational goals and weighed the purported educational benefits against the burden on constitutional rights to determine whether the burden was justified. (*Galda, supra,* 772 F.2d at pp. 1065-1068.) This, of course, is the same approach that the Second Circuit took in *Carroll* (*supra,* 957 F.2d at pp. 1001-1002).

Following this approach, the *Galda* court accepted the university's argument that participation in New Jersey PIRG offered educational benefits to students. However, the court determined that the educational benefits offered by New Jersey PIRG were not sufficient to justify the infringement of dissenting students' speech and associational rights. The court reasoned as follows: "Although the training PIRG members may receive is considerable, there can be no doubt that it is secondary to PIRG's stated objectives of a frankly ideological bent. To that extent the educational benefits are only 'incidental'—arising from or accompanying the principal objectives—and subordinate to the group's function of promoting its political and ideological aims." (772 F.2d at p. 1065.)

While there is language in *Galda* suggesting that the mandatory funding of political groups might be acceptable if accomplished through a content-neutral process in which all groups on campus were free to compete (772 F.2d at p. 1067), the opinion did not purport to announce such a holding. Moreover, other language in the opinion cogently demonstrates why a content-neutral funding process, standing alone, cannot sufficiently protect the rights of students who do not wish to subsidize other students' political activity. To quote the *Galda* opinion, "even if the opponents succeed in achieving mandatory contributions for their own organization, they are not relieved from the obligation to pay a fee to a group with which they disagree. For example, if the university compelled a student to make separate contributions to both the Democratic and

Republican National Committees, the evil is not undone: it compounded. Adherents to each party would be forced to pay a fee to the other political group, a clearly unconstitutional exaction." (*Ibid.*) The Second Circuit made the same point in *Carroll, supra*: "The fact that appellants' student activity fee will also compel them to speak through a number of other campus groups in addition to NYPIRG in no way heals the constitutional infirmity; it simply means that students must fund more than one unwanted view." (957 F.2d at p. 998, citing *Galda, supra*, 772 F.2d at p. 1067.)

The principles that we derive from *Carroll* and *Galda*, as well as *Keller* and *Abood*, are these: A university may, in general, support student groups through mandatory contributions because that use of funds can be germane to the university's educational mission. (*Carroll, supra*, 957 F.2d at pp. 1001-1002; cf. *Keller, supra*, 496 U.S. at pp. 13-14; *Abood, supra*, 431 U.S. at pp. 232-237.) At some point, however, the educational benefits that a group offers become incidental to the group's primary function of advancing its own political and ideological interests. (*Galda, supra*, 772 F.2d at pp. 1065, 1068; cf. *Carroll, supra*, 957 F.2d at p. 1002.) To fund such a group may still provide some educational benefits, but the incidental benefit to education will not usually justify the burden on the dissenting students' constitutional rights. Phrased in terms of the tests that courts have applied, a regulation that permits the mandatory funding of such groups is not "'narrowly drawn to avoid unnecessary intrusion on freedom of expression'" (*Carroll, supra*, 957 F.2d at p. 999, quoting *Schad v. Mount Ephraim, supra*, 452 U.S. at p. 69 fn. 7; see also *Carroll, supra*, 957 F.2d at p. 1002), and it "unnecessarily restrict[s] constitutionally protected liberty, [when] there is open a less drastic way of satisfying its legitimate interest" (*Galda v. Rutgers, supra*, 772 F.2d at p. 1066).

One can reach the same result by applying the *Carroll* court's alternative formulation of the test. When mandatory funding is being used to create an incidental benefit to education at the cost of a significant burden on

constitutional rights, then it cannot usually be said that the state is "'promot[ing] a substantial government interest that would be achieved less effectively absent the regulation.'" (*Carroll, supra,* 957 F.2d at p. 999, quoting *Albertini, supra,* 472 U.S. at p. 689.)

We find no reason to doubt that the burden on dissenting students' speech and associational rights in this case is real and substantial. Students are, in fact, forced to support causes they strongly oppose. For example, students who favor abortion rights must pay to support the political activities of Berkeley Right to Life, a group opposed to abortion, and students opposed to abortion must subsidize groups such as Campus N.O.W. and Campus Abortion Rights Action League, which favor abortion rights. Another possible consequence of the current funding system was suggested at oral argument. Counsel for the ASUC acknowledged that a group which espoused the supremacy of a particular race would be eligible to receive mandatory fees so long as it permitted all students to join without discrimination. A sufficient remedy for the "incidental infringement" of the rights of a student of a different race, counsel suggested, would be to "join that group and engage in vigorous debate within that group as to whether their ideas are acceptable or not." One might ask, rhetorically, whether being compelled to subsidize an organization whose goals one abhors is less of a burden than being compelled to display the state motto on a license plate (*Wooley v. Maynard* (1977) 430 U.S. 705, 714-717 ["Live Free or Die"]), a burden that the high court has found to be impermissible.

The ASUC does purport to have a standard for identifying those groups whose political activities are of such a nature as to disqualify them from receiving support from mandatory fees. Specifically, an ASUC rule requires that funds not be used for "partisan political activities or any ballot measure . . . ." (ASUC, Policy & Procedure Manual, Guidelines for Funding Student Organizations, pp. 9-10.) However, the rule does not satisfy constitutional

requirements, either on its face or as applied. While the rule on its face bars funding only for "partisan political" activities, much broader concerns are at stake. The Court's opinion in *Abood, supra,* 431 U.S. 209, makes this clear: "It is no doubt true that a central purpose of the First Amendment '"was to protect the free discussion of governmental affairs."' [Citations.] But our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection. Union members in both the public and private sectors may find that a variety of union activities conflict with their beliefs. [Citations.] Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective 'political' can properly be attached to those beliefs the critical constitutional inquiry." (*Id.* at pp. 231-232, fn. omitted.)

Moreover, as applied by the ASUC, the "partisan political" rule actually *permits* the use of mandatory fees to fund a great deal of activity that is indisputably political and even "partisan" by any reasonable definition.[10] Indeed, the ASUC's executive vice-president testified at trial that the rule has been interpreted to bar funding only for the campus Young Republicans and Young Democrats. In contrast, the rule has been interpreted not to bar funding for "a group that supports the nuclear freeze initiative," "organizations that support the [proposed Equal Rights Amendment]," "organizations that hold demonstrations against the policies of the Reagan administration," "organizations that oppose U.S. aid to the government of El Salvador," "[o]rganizations that oppose construction of the peripheral canal," "[o]rganizations that support gay rights legislation," "a group that advocates replacement of our current form of government with a revolutionary socialist

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[10]A "partisan" is generally defined as "one that takes the part of another: an adherent to a party, faction, cause, or person . . . ." (Webster's Third New Internat. Dict. (1982) p. 1647.)

regime," and "a group that supports abolition of the death penalty." Confronted with these funding decisions on cross-examination, the ASUC witness conceded that she could not articulate the criteria by which the ASUC determined whether a group was "partisan" or "nonpartisan."

If these examples left any doubt that the ASUC's "partisan political" rule lacked any meaningful content, to be convinced of the point one would only need to consider the ASUC's decision to fund the Young Spartacus League. This group, according to the record, supported the former Soviet Union's invasion of Afghanistan, opposed the Solidarity movement in Poland, and, to quote its successful application for ASUC funding, "seeks to build a revolutionary socialist movement which can intervene in all social struggles armed with a working class program based on the politics of Marx, Lenin and Trotsky, as part of a disciplined revolutionary movement." We do not in any way mean to suggest that this group, or any group, should not be permitted to register with the University and attempt by all legitimate means to persuade other students of the correctness of its views. However, to fund the Young Spartacus League as "nonpartisan," while denying funding to the Young Republicans and Young Democrats as "partisan," borders on the absurd.

We need not determine in the first instance whether each of the groups that plaintiffs specifically challenged at trial do or do not offer educational benefits that justify the infringement of plaintiffs' speech and associational rights. However, if the Regents decide to implement educational programs that entail burdens on constitutional rights they must ensure that the burdens are justified, and it is clear that they have made no serious effort to do so. At oral argument, counsel for the Regents argued that such a determination is virtually impossible to make because the terms "political" and "ideological" are vague. However, the high court has required labor unions and a state bar association to identify "political" and

"ideological" activities that cannot properly be charged to mandatory contributors. (*Keller, supra,* 496 U.S. at p. 15; *Abood, supra,* 431 U.S. at pp. 235-236.) As already discussed, the Regents have more discretion than the defendants in *Keller* and *Abood* in determining how to use mandatory fees because some student political activity is germane to the University's educational mission. However, when a group's educational function has become merely incidental to its political and ideological activities, then the infringement of dissenting students' constitutional rights can no longer be justified by the purported educational benefit. (*Galda, supra,* 772 F.2d at pp. 1065, 1067-1068.)

So long as the present system of funding student activity groups continues, the only practical way to protect the rights of dissenting students is to implement the procedures outlined in *Hudson, supra,* 475 U.S. 292, 301-310, and *Keller, supra,* 496 U.S. 1, 16-17. These procedures will require the Regents to identify any groups that are ineligible for mandatory funding under the constitutional standards set out above and offer students the option of deducting a corresponding amount from the mandatory fee. The State Bar of California adopted a similar procedure to comply with the high court's decision in *Keller, supra.* Students who disagree with the Regents' calculation of the deduction will be entitled to the procedural safeguards articulated in *Keller*: "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." (496 U.S. at p. 16, internal quotation marks omitted.)

While these procedure will obviously entail some administrative burden, they will not necessarily require the Regents to review each of the University's 150 registered student groups. Of these groups, the vast majority appear to have no discernible political or ideological interests; plaintiffs have challenged only 14. Moreover, as the high court has observed, even if such a procedure did "'result in

some . . . administrative burden . . . and perhaps prove at times to be somewhat inconvenient, such additional burden or inconvenience is hardly sufficient to justify contravention of the constitutional mandate. It is noteworthy that unions representing government employees have developed, and have operated successfully within the parameters of *Abood* procedures for over a decade.'" (*Keller, supra,* 496 U.S. at pp. 16-17, quoting *Keller v. State Bar* (1989) 47 Cal.3d 1152, 1192 (conc. and dis. opn. of Kaufman, J.).)

Of course, the Regents must provide a refund only to those students who object to the use of their fees for political and ideological activities. There is no legal barrier to funding such activities with the fees of students who do not object. Moreover, the refund will be necessary only so long as the Regents continue to subsidize political and ideological activities through mandatory fees. The Regents are free to adopt another system of funding student activities, such as a voluntary system, that avoids the constitutional defects identified in this opinion.

C. ASUC-funded Lobbying.

Plaintiffs have also challenged the ASUC's use of mandatory fees to lobby the state and municipal governments. Issues on which the ASUC has lobbied in the past include a nuclear freeze initiative, public transportation fares, city investment policy, zoning, rent control, rent discrimination, the use of registration fees to fund abortions, budget cuts for the University, and mandatory student fees.

The Court of Appeal disposed of plaintiffs' claim summarily, observing that "the record supports the trial court's finding that lobbying activities are confined to student and university issues." Applying the test of germaneness articulated in *Keller* (*supra,* 496 U.S. at pp. 13-14) and *Abood* (*supra,* 431 U.S. at pp. 217-223, 232-237), the court concluded that "no constitutional infringement occurred" because the ASUC's lobbying activities "are related to the university's function."

The Court of Appeal's reasoning entails two serious flaws. First, the trial court did not make the finding on which the Court of Appeal purported to rely. Rather than finding that the ASUC's lobbying efforts had been confined to student- and university-related issues, the trial court in its statement of decision merely cited a University policy permitting the ASUC to lobby on such issues. In fact, there is undisputed evidence in the record that the ASUC has lobbied on issues that have no meaningful relationship to students as students or to the University, such as a nuclear freeze initiative and municipal investment policy.

Second, even if the ASUC's lobbying had been limited to student- and university-related issues, it does not follow that there is no constitutional problem. The Court of Appeal's reasoning assumes that one of the ASUC's purposes is to represent student interests before the municipal and state governments and that lobbying on university-related issues is germane to that purpose under *Keller* (*supra*, 496 U.S. 1) and *Abood* (*supra*, 431 U.S. at 209.) However, plaintiffs' meritorious objections to this reasoning find no answer in the Court of Appeal's opinion.

Plaintiffs object, initially, that the analogy to collective bargaining is not truly apposite in this context. While the Regents have authorized the ASUC to communicate with government officials on public issues (University of Cal., Policies Applying to Campus Activities, Organizations, and Students, Pt. A (rev. July 21, 1978) § 63.00, at p. 18),[11] the Regents have not purported to

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[11]"Student governments shall have the right to address and take positions on public issues. Positions on issues taken by student governments shall not be represented as or deemed to be official positions of the University. Compulsory student fees shall not be expended in support of such positions except for University-related purposes. Any communications by student governments or units thereof to Federal, State, or local government officials or bodies on such issues must avoid any implication that the positions taken are sponsored, endorsed, or favored by the University. This does not affect the right of

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interference with the First Amendment interests of objecting employees.' [Citation.] There is no question as to the expressive and ideological content of these activities. Further, unlike discussion by negotiators regarding the terms and conditions of employment, lobbying and electoral speech is likely to concern topics about which individuals hold strong personal views. Although First Amendment protection is in no way limited to controversial topics or emotionally charged issues [citations], the extent of one's disagreement with the subject of compulsory speech is relevant to the degree of impingement upon free expression that compulsion will effect.

> "The burden upon freedom of expression is particularly great where, as here, the compelled speech is in a public context. By utilizing petitioners' funds for political lobbying and to garner the support of the public for its endeavors, the union would use each dissenter as 'an instrument for fostering public adherence to an ideological point of view he finds unacceptable.' [Citation.] The First Amendment protects the individual's right of participation in these spheres from precisely this type of invasion. Where the subject of compelled speech is the discussion of governmental affairs, which is at the core of our First Amendment freedoms [citations], the burden upon dissenters' rights extends far beyond the acceptance of the agency shop and is constitutionally impermissible." (*Lehnert, supra,* ___ U.S. at p. ___ [114 L.Ed.2d at p. 595].)

Thus, under *Lehnert*, even if the state has a sufficiently compelling interest to require unwilling persons to support an organization financially, the state may not compel support for lobbying efforts except on those matters

that are strictly necessary to further the interest that justified the requirement of support. Applying this principle to the case before us compels us to reverse the judgment. Even if the Regents had appointed the ASUC to negotiate with governmental bodies on students' behalf, and even if the state had a compelling reason to do so, under *Lehnert* the state still could not force unwilling students to subsidize lobbying beyond the narrow subject matter that justified the requirement of support. However, the Regents have not claimed any interest in requiring students to support the ASUC's lobbying except the interest in providing an educational opportunity. In view of the "core" political freedoms that are at stake (see *Lehnert, supra,* ___ U.S. at p. ___ [114 L.Ed.2d at p. 591]), the educational benefit to a few student lobbyists cannot justify the burden on all students' free speech and associational rights.

For these reasons, we hold that the Regents may not collect, from any student who objects, that portion of the mandatory fee that represents the cost of lobbying governmental bodies. Students who disagree with the Regents' calculation of the corresponding deduction will be entitled to the procedural safeguards set out above. (See *Hudson, supra,* 475 U.S. 292, 301-310; *Keller, supra,* 496 U.S. 1, 16-17.)

D. The ASUC Senate's Political Activities.

For many years, the ASUC Senate has debated, adopted, and publicized resolutions on current political issues. Issues that have received the ASUC Senate's attention include, for example, gay and lesbian rights, the proposed Equal Rights Amendment, gun control, draft registration, boycotts of businesses involved in labor disputes, the reelection of a United States Representative, a municipal initiative to legalize marijuana, and the treatment of political prisoners in foreign countries. The ASUC Senate also supports voter registration, draft counselling, and renters' assistance programs. Plaintiffs

introduced evidence at trial to show that these program had occasionally become channels for political activity.

Plaintiffs contend that the state may not compel them to finance these political activities through mandatory fees. In opposition, the Regents assert that no income from mandatory contributions has been used to support such activities. The trial court did not specifically address this issue in its statement of decision. The Court of Appeal upheld the ASUC Senate's political activities, but it did not rely on the Regents' theory that no mandatory fees have been used to subsidize them. Instead, avoiding the unresolved factual issue, the court purported to uphold the ASUC Senate's political activities as a matter of law. The court reasoned that such activities "contribute[] to the educational mission of the university" and that, if plaintiffs did not approve of positions taken by the ASUC Senate, "there is nothing to prevent plaintiffs from seeking senate office and making their own voices heard in the senate debates."

The Court of Appeal's resolution of this issue cannot withstand scrutiny. To be sure, the ASUC Senate's practice of taking and publicizing positions on political issues may have educational value for those few students who are involved. However, as already discussed, if mandatory fees are used for this purpose there is a burden on dissenting students' speech and associational rights. The Court of Appeal's analysis is incomplete because it made no effort to determine whether the purported educational benefits justify the burden. Indeed, the court betrayed a certain indifference to plaintiffs' constitutional claims in suggesting that the remedy for compelled speech lies in more compelled speech, i.e., suggesting that plaintiffs "seek[] senate office and mak[e] their own voices heard in the senate debates."

Of course, there would be no need to address plaintiffs' claim if it were true, as the Regents assert, that no income from mandatory fees has been used to support the ASUC Senate's political activities. However, the Regents

position seems to contradict the trial court's finding that mandatory fees were used for "operation expenditures for the ASUC Senate." The Regents' position also seems to contradict the ASUC's response to plaintiffs' interrogatories. In their interrogatories, plaintiffs asked the ASUC to "[s]tate what steps ASUC has taken to publicize resolutions adopted by the ASUC Senate." The ASUC answered that it had "placed ads in the Daily Cal [a student newspaper]; distributed posters, leaflets and flyers; published ASUC information books; sent out press releases to major media; sponsored on-campus discussion groups, workshops and rallies; [and] placed notices on campus bulletin boards and kiosks . . . ." These forms of publicity usually entail costs, if only for paper and ink.

The Regents' assertion that mandatory fees have not been used to subsidize the ASUC's political activities could also mean that the ASUC segregates mandatory fees from other sources of income and uses the former only for nonpolitical purposes. The earmarking of funds, however, would not necessarily eliminate the constitutional problem. In *Abood* (*supra*, 431 U.S. 209, 237 fn. 35), the high court rejected earmarking as a remedy for constitutional violations caused by the use of mandatory fees for political purposes. Because earmarking leaves the same total amount of funds at the organization's disposal and permits the organization to spend the same amount on political activities, earmarking "'is of bookkeeping significance only rather than a matter of real substance.'" (*Ibid.*, quoting *Retail Clerks International Assn. v. Schermerhorn* (1963) 373 U.S. 746, 753.) For these reasons, the Court has held in the agency-shop content that "it is plainly not an adequate remedy to limit the use of the actual dollars collected from dissenting employees to collective-bargaining [*i.e.*, non-political and non-ideological] purposes . . . ." (*Abood, supra*, 431 U.S. at p. 237 fn. 35.)

In view of the foregoing discussion, it is evident that the lower courts have not yet adequately addressed the factual and legal issues raised by the ASUC Senate's own political activities. If further evidentiary proceedings show

that mandatory fees have been spent on political activities by the ASUC Senate, then the Regents shall have the burden of demonstrating that the resulting burden on dissenting students' speech and associational rights is germane to, and justified by, such activities' educational value in accordance with the principles discussed above. If the Regents do not satisfy that burden, then plaintiffs will be entitled to relief under the procedures set out in *Keller, supra,* 496 U.S. 1, 16-17, and *Hudson, supra,* 475 U.S. 292, 301-310. We shall remand these issues for further proceedings in accordance with the views expressed herein.

In view of our determination that plaintiffs are entitled to relief on their claims regarding student groups and ASUC lobbying, and that further proceedings must take place on plaintiffs' claims regarding the ASUC Senate's political activities, there is no need at this stage of the proceeding to address plaintiffs' alternative claims to the same relief under article IX, section 9 of the state Constitution; section 13 of the Organic Act (Stats. 1867-1868, ch. CCXLIV, § 13, p. 254)); *Stanson v. Mott, supra,* 17 Cal.3d 206; and the federal Constitution's establishment clause (U.S. Const., Amend. I).

III. DISPOSITION

The judgment of the Court of Appeal is affirmed insofar as it holds that the Regents of the University have power to impose and collect a mandatory student activities fee. In all other respects the judgment is reversed. The case is remanded to the Court of Appeal, which shall direct the superior court to conduct further proceedings, and to grant relief, in accordance with this opinion.

PANELLI, J.

WE CONCUR:
LUCAS, C. J.
KENNARD, J.
BAXTER, J.
GEORGE, J.

SMITH v. REGENTS OF U.C.

S006588

DISSENTING OPINION BY ARABIAN, J.

Today's decision does a disservice to the people of the State of California, and to the high principles that this court is sworn to uphold.

I do not disagree with my colleagues lightly or often. However, in holding that the University of California at Berkeley (University) violates the United States Constitution by promoting the dissemination of controversial *ideas*, the court itself violates that fundamental charter of freedom. In premising this holding on a spurious and ill-defined distinction between "educationally beneficial" and "ideological" speech, the majority abdicate their primary duty of reasoned adjudication, and condemn the University and the lower courts to additional and futile litigation. In disdaining *unanimous* state and federal case law to the contrary, they underscore their isolation from mainstream jurisprudence. In purporting to reach this unfortunate result under compulsion of United States Supreme Court precedent, they fundamentally misread the high court's landmark decisions, and contravene the spirit of their holdings.

Accordingly, I must dissent. Contrary to the majority, I would hold that the funding of student groups engaged in on-campus speech—regardless of political or ideological content—is germane to the University's educational mission and serves compelling national interests. As long as the funds are distributed in a neutral fashion and are not used to promote partisan political purposes, to finance off-campus activities or to interfere

with the free speech rights of others, such funding is well encompassed within the constitutional mandate of the University.

INTRODUCTION

Let us be clear about what is at issue here. The dispute centers on the University's considered educational judgment that student groups who distribute leaflets, show films, sponsor speakers and organize discussion forums on the University campus, help contribute to the mission of the University and therefore may be reimbursed for certain limited expenses from the fund generated by the mandatory student fee. The majority *reject* the University's judgment. They believe, rather, that because some students disagree with the "political" views expressed by certain groups, the First Amendment rights of the dissenting students must take precedence. They hold that where the "educational benefit" of such speech is merely "incidental" to its "political" or ideological" message, it may not constitutionally be funded from the mandatory fee.

To those who honor the Constitution, respect academic freedom, and strive to uphold the integrity and rationality of the courts, the majority decision will be greeted as a jurisprudential debacle. It fails completely—in fact it makes virtually *no* effort—to explain much less support its holding that speech with an "ideological" or political" message is *any* less educationally beneficial than speech which lacks such political content. Indeed, the majority betray a shocking ignorance of the University's educational mission and the vital state interest that it serves—the regeneration of those fundamental republican virtues upon which this nation was founded, and upon which its continued commitment to civil liberty depends. I am referring, of course, to the power and determination of its citizens to form and express their own opinions, to critically evaluate the opinions of others, and, most importantly, to *tolerate* the opinions of those with whom they most *disagree*.

The funding of on-campus activities groups engaged in a broad variety of speech—controversial, political, ideological, social, cultural—no matter how annoying or disagreeable to some, plays an integral role in the University's mission. Indeed, such speech is inherently educational. It is not the "price" students pay for a university education, it is the very essence of that education.

The majority's ill-conceived dichotomy between "political" and "educationally beneficial" speech does more, however, than simply misunderstand the nature of the University and its critical role in our political culture. The majority provide virtually *no* guidance to the parties and the lower courts to distinguish between "political" and "educationally beneficial" speech. The record contains literally dozens of leaflets, pamphlets and broadsides posted and distributed on campus by the student groups that plaintiffs oppose. Which of these lacks sufficient "educational" content to be eligible for reimbursement of printing costs? The leaflet distributed by Women Organized Against Sexual Harassment inviting students to a workshop to "talk about our experiences. . . . [and] to provide legal, emotional and political support?" The leaflet distributed by the Berkeley Feminist Alliance announcing a documentary film "against militarism, poverty, and oppression" and sponsoring a speaker from El Salvador "speaking on women's involvement in the struggle there?" A broadside sponsored by the Education & Action Project announcing a rally of "speakers and music" to protest the President's environmental and social policies? The majority provide no guidance to the lower courts and the Regents to judge the "educational benefit" of these pamphlets; it is virtually anyone's guess.

The majority's reluctance to provide specific standards or illustrations is easy to understand. The dichotomy between "educationally beneficial" and "ideological" speech is a false and pernicious one. It purports to judge the educational *value* of speech on the

extent of its political message or ideological viewpoint. Such an enterprise is fraught with peril, to the academic freedom of the University, and to the right of all Americans to think and speak freely.

Perhaps this is why the majority, having created such a troubling doctrine, are unable to apply it. Instead, in "deference" to the University's academic judgment, the majority remand the matter to the Regents to separate the "educationally beneficial" groups from the excessively "political" or "ideological," and to adopt a funding mechanism reflecting these decisions. Confronted with the court's holding, the Regents' practical options are limited, and none of them is appealing: (1) Abolish the mandatory fee altogether on every University campus. This is not a likely scenario, in light of the Regents' demonstrated commitment to the funding of student speech; (2) Attempt to comply with the court's holding, which will unleash a firestorm of protest and lawsuits by those groups deemed (by whatever arbitrary standards the University might devise) too "political" to warrant funding; or (3) Maintain their current position that all of the University's registered groups are "educationally beneficial," a conclusion clearly in defiance of the majority's implication that certain groups, such as the Young Spartacus League (which according to its charter "seeks to build a revolutionary socialist movement . . . ") fall in the noneducational category. This will undoubtedly trigger a new lawsuit by plaintiffs to enforce the "principles" set forth in the majority opinion. The court's opinion, in short, will only generate further litigation in a vain attempt to decipher its cryptic and misguided holding.

The crux of the constitutional issue is cogently presented here; the dispositive determination has been made; a remand advances the issue not a step further. The majority's holding that the University is constitutionally forbidden to fund student speech whose "educational benefit" is only incidental to its "ideological" viewpoint represents such a radical departure from educational reality

and settled law (as will appear, all of the case law is to the contrary) that I urge the University to petition the United States Supreme Court for certiorari, and that high court to grant review.

DISCUSSION

A. Summary

The precise question presented is whether the First Amendment to the United States Constitution compels the dismantling of a system of mandatory student fees utilized by the University and other U.C. campuses throughout the state to finance student government and activities groups. Plaintiffs, Berkeley students who disagree with the views expressed by many of the groups receiving such funds, contend that the mandatory fee constitutes a species of compelled speech prohibited by the First Amendment as interpreted by the United States Supreme Court in such cases as *Abood v. Detroit Board of Education* (1977) 431 U.S. 209 (*Abood*) and *Keller v. State Bar of California* (1990) 496 U.S. 1 (Keller).[1]

The question plaintiffs raise is an important one. As Justice Jackson eloquently observed, our Constitution permits "no official, high or petty, [to] prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ." (*Board of Education v. Barnette* (1943) 319 U.S. 624, 642; accord *Keller, supra,* 496 U.S. at p. 10; *Abood, supra,* 431 U.S. at p. 235.) Indeed, the

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[1]It is important to state clearly that the issue here turns on the First Amendment to the United States Constitution and *not* its state equivalent, article I, section 2, subdivision (a) of the California Constitution. The majority note that plaintiffs raised the State provision in their complaint, but give no indication that plaintiffs failed to discuss the State provision in their Court of Appeal briefs, failed to raise the state provision in their petitions for review, and failed to cite, argue or discuss the state provision in their subsequent briefs on the merits. Thus, the state provision was not preserved for review on appeal, and therefore forms no independent basis of the court's decision.

University's educational mission is precisely to combat orthodoxy by encouraging the dissemination of a multiplicity of views and interests, many of which will inevitably provoke controversy, debate and opposition. The collection and disbursement of the mandatory fee play an integral part in the University's educational function, by providing students with the modest financial assistance necessary to engage in student government and parliamentary debate, to organize around common interests, and to advocate and argue ideas in the spirited intellectual atmosphere of the university campus.

Thus, while we look to the Supreme Court's decisions for guidance, the fact remains that we are confronted with an institution whose scope and purposes are altogether different from the labor union in *Abood* or the state bar in *Keller*. The latter constitute highly specialized vocational groups, organized around the narrow interests of a single industry or profession and designed to speak for those interests with essentially one voice. These constraints, the United States Supreme Court has concluded, require strict limits on the uses to which their members' mandatory dues may be put. (*Keller, supra,* 496 U.S. at pp. 13-16; *Abood, supra,* 431 U.S. at pp. 233-236.)

A university is different; its interests are not narrowly vocational, but broadly educational; its mission is centered not on the goal of representing an industry or a profession, but on the concept that intellectual growth and fulfillment require a "wide exposure to that robust exchange of ideas which discovers truth 'out of a *multitude of tongues* . . . .'" (*Keyishian v. Board of Regents* (1967) 385 U. S. 589, 603, italics added.) The dissemination of often controversial and even disagreeable ideas goes to the very heart of the university experience. Application of the mandatory fee to the communication of such ideas furthers goals that are not only "germane" (*Abood, supra,* 431 U.S. at p. 235) but integral to the University's educational objectives.

Accordingly, subject to the limitations set forth below, I would hold that the exaction and use of the mandatory student fee to support student government and activities is consistent with the First Amendment and Supreme Court precedent.

B. Constitutional Background

Although this case raises constitutional issues in a context not heretofore considered by this or the United States Supreme Court, our analysis is informed by existing precedent.

At the outset, it is important to recognize, as the United States Supreme Court has observed, that we confront "delicate issues concerning the academic community." (*Healy v. James* (1972) 408 U.S. 169, 171.) Contemporary concerns over "political correctness" notwithstanding, the American university remains among the world's freest forums for intellectual inquiry and debate. We must approach our task, therefore, "with special caution" (*ibid.*), understanding that the institution's continued vitality and independence are contingent upon its freedom from disruptive judicial interference.

Restraint does not imply complaisance, however. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." (*Tinker v. Des Moines Independent School District* (1969) 393 U.S. 503, 506.) Indeed, as the high court has written, "the precedents of this Court leave no room for the view that . . . . First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" (*Healy v. James, supra,* 408 U.S. at p. 180, quoting *Shelton v. Tucker* (1960) 364 U.S. 479, 487.) Thus, far from dulling our powers of review, the University's unique status as a forum for free expression impels a sharpened judicial

scrutiny, sensitive to both institutional interests and the constitutional rights of the individual.

Plaintiffs contend that their First Amendment guarantees of free speech and association have been violated by the University through the imposition and use of the mandatory student fee. More particularly, they oppose as *compelled* speech and association the University's allotment of a portion of their student fees to the Associated Students of the University of California (ASUC), for the purpose of financing the advocacy of political and ideological views which they reject. They also contend that the Regents lack the authority to impose a mandatory student fee. I shall address the constitutional claim first, as it constitutes by far the more weighty and serious challenge.

Although on its face the First Amendment protects neither the right of association nor the right to be free from compelled speech and association, both rights are now well established in our jurisprudence. The United States Supreme Court has declared that the activities expressly protected by the First Amendment—to speak, assemble, petition for redress of grievances and exercise one's religion—encompass a complementary right to "associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." (*Roberts v. United States Jaycees* (1984) 468 U.S. 609, 622.) This right of expressive association, in turn, "presupposes a freedom not to associate." (*Id.* at p. 623.) Similarly, the high court has held that the First Amendment right to speak implies a corresponding right to "refrain from speaking." (*Wooley v. Maynard* (1977) 430 U.S. 705, 714.) As the Supreme Court in the landmark case of *Board of Education v. Barnette, supra,* 319 U.S. 624, 631, declared, the Constitution guarantees the individual freedom from "compulsion . . . to declare a belief."

C. Compulsory Dues Under the First Amendment

These principles have been extended by the Supreme Court to prohibit the state from exacting compulsory contributions to unions for purposes not germane to the collective bargaining process. The pivotal case in this area is *Abood, supra,* 431 U.S. 209. There, the Supreme Court recognized that state laws authorizing unions and management to enter into "agency shop" agreements requiring every employee, whether or not a member of the union, to pay the union a service charge, impinge upon the employee's right to be free from compelled speech and association. Nevertheless, the Court concluded that any interference with the employees' First Amendment rights was "constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." (*Id.* at p. 222.) At the same time, however, the Court found meritorious the argument that employees "may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." (*Id.* at p. 234.)[2]

Abood, supra, 431 U.S. 209, did not prohibit a union from spending funds for the expression of political views unrelated to its collective bargaining function; it merely held that dissenting employees may not be coerced into financing such activities. (*Id.* at p. 235.) Nor did *Abood* attempt to formulate a standard for distinguishing between

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[2]*Abood* represented the culmination of a line of decisions beginning with *Railway Employes' Dept. v. Hanson* (1956) 351 U.S. 225 and progressing through *Railway Clerks v. Allen* (1963) 373 U.S. 113 and *International Association of Machinists v. Street* (1961) 367 U.S. 740 in which the Court upheld federal legislation authorizing union shop agreements and the imposition of compulsory dues on the grounds that it promoted industrial peace and distributed fairly the cost of union activities to those who benefit, but reserved the constitutional questions posed by the expenditure of mandatory dues for purposes not germane to collective bargaining.

collective bargaining activities and undertakings unrelated to collective bargaining, or to prescribe the procedures necessary to ensure that objecting employees did not finance such nongermane speech. (*Id.* at p. 236.) Subsequently, however, in *Elis v. Railway Clerks* (1984) 466 U.S. 435, the high court declared that a union activity may be financed out of compulsory dues if it is "*normally or reasonably employed to implement or effectuate*" the union's duties as exclusive bargaining representative. (*Id.* at p. 448, italics added.) And in *Teachers v. Hudson* (1986) 475 U.S. 292, the Court held that "the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." (*Id.* at p. 310.)

Recently, in *Keller, supra,* 496 U.S. 1, the United States Supreme Court extended the *Abood* analysis to an integrated state bar, reaffirming its earlier conclusion in *Lathron v. Donahue* (1961) 367 U.S. 820, that the exaction of compulsory bar dues does not per se violate an individual's rights, but holding that the First Amendment prohibits the expenditure of members' dues on speech unrelated to the regulation of the legal profession. Reasoning by analogy from *Abood* and its progeny, the high court acknowledged the integrated bar's impingement on members' First Amendment rights, but held that the compelled association was "justified by the State's interest in regulating the legal profession and improving the quality of legal services." (*Keller, supra,* 496 U.S. at pp. 13-14.) It followed that the California State Bar may constitutionally fund speech "germane" to these goals, i.e., "necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of . . . legal service,'" but may not finance "activities of an ideological nature which fall outside of those areas of activity." (*Id.* at p. 14.) While declining to define "[p]recisely where the line falls," the high court nevertheless observed that "the extreme ends of the

spectrum are clear: Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative: at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession." (*Id.* at pp. 15-16.)

Neither *Abood* nor *Keller* addressed directly the constitutional standard to be applied in balancing the state's interests in the collection and use of a mandatory fee against the infringement of associational rights occasioned thereby. In upholding the imposition of compulsory union dues in *Abood*, however, the high court referred to "*important* government interests" served by the union shop in the system of labor relations established by Congress. (431 U.S. at pp. 222, 225, italics added.) Similarly, *Keller*'s discussion of the integrated state bar spoke in terms of "*substantial* public interests," and held that the expenditure of mandatory dues must be "necessarily or reasonably incurred for the purpose" of effectuating those interests. (496 U.S. at pp. 13-14, italics added.) Interestingly, neither decision explicitly applied a strict scrutiny standard, thus triggering the need for a compelling state interest and narrow legislative tailoring to accomplish the governmental objective. (See *Elrod v. Burns* (1976) 427 U.S. 347, 362.) One federal circuit court, as a result, has applied a middle-tier test to determine the constitutionality of mandatory student fees, inquiring whether the state interests served by the fees are sufficiently important or substantial to justify the First Amendment infringement. (*Carroll v. Blinken* (2nd Cir. 1992) 957 F.2d 991, 999, cert. den. ____ U.S. ___ [121 L.Ed.2d 224] ["We . . . look to see whether the regulation 'promotes a substantial government interest that would be achieved less effectively absent the regulation.'"]; see also Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association* (1984) 36 Rutgers L. Rev. 3, 29-35 [hereafter Cantor]; but cf. *Galda v. Bloustein* (3rd Cir. 1982) 686 F.2d 159, 164.)

Nevertheless, plaintiffs here maintain that strict scrutiny is the appropriate standard of review. They note that in *Teachers v. Hudson, supra,* 475 U.S. 292, the Supreme Court stated that a union's rebate procedures for dues expended in violation of *Abood* must be "carefully tailored to minimize the [First Amendment] infringement." (*Id.* at p. 303.) And in *Elrod v. Burns, supra,* 427 U.S. 347, the court observed generally that a "significant impairment of First Amendment rights must survive exacting scrutiny." (*Id.* at p. 362.)

Although suggestive, these statements in *Elrod* and *Hudson* are less than altogether persuasive, particularly in light of the high court's pointed failure to endorse a strict scrutiny standard in the two seminal decisions—*Keller, supra,* 496 U.S. 1, and *Abood, supra,* 431 U.S. 209—where one would reasonably expect it. I shall, accordingly, apply the standard expressly prescribed by the high court, inquiring whether the mandatory student fee serves "important" (*Abood, supra,* 431 U.S. at p. 225) or "substantial" (*Keller, supra,* 496 U.S. at p. 13) state interests, and whether the ASUC expenditures are "necessarily or reasonably incurred" (*id.* at p. 14) to effectuate those interests.[3]

D. Constitutionality of ASUC Expenditures

With the foregoing principles in mind, I turn to the critical issues before us: What is the defining mission of the University for purposes of First Amendment analysis under *Keller* and *Abood,* does that mission serve important state interests, and is the mandatory student fee reasonably

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[3]In concluding that the mandatory student fee is subject to strict scrutiny, the majority simply ignore the fact that the United States Supreme Court expressly applied a middle-tier standard of review in the two leading mandatory dues cases, *Keller, supra,* 496 U.S.1 and *Abood, supra,* 431 U.S. 209. However, even assuming for the sake of argument that strict scrutiny applies, I would hold that the mandatory student fee serves a compelling governmental interest, and is narrowly tailored to achieve its goal.

employed to effectuate that mission? In resolving these questions, I shall consider the exaction and expenditure issues together, for as *Keller* instructs, to define the interests which justify the imposition of a mandatory fee is to delineate the constitutional uses to which such funds may be put. (*Keller, supra,* 496 U.S. at p. 13 [The First Amendment forbids the expenditure of mandatory dues for "ideological activities not 'germane' to the purpose for which compelled association was justified . . . ."].) Each of the parties', as well as the majority's, responses to these critical questions will be considered in turn.

(1) Plaintiffs' Response

Unfortunately, plaintiffs do not attempt to define the University's mission for purposes of delineating its funding limitations. They simply assert that any expenditure of the mandatory fee must be germane to "students in their capacity as students" and must exclude activities "political" or "controversial" in nature. Presumably implied in these assertions is some principle limiting the University's purpose to "student oriented" or noncontroversial subjects. Regretfully, however, plaintiffs also fail to elaborate on these rather vague categories. "Students in their capacity as students" apparently excludes, for plaintiffs, any issue or activity which is pertinent to students as members of the "community" at large. Plaintiffs provide few specifics, but this would apparently *exclude* funding such groups as the League of Arab Students and the UC Polish Dance Club, since both routinely address subjects that transcend the University campus.[4] Plaintiffs would apparently permit the funding of speech related specifically to classes, curricula, athletics and perhaps tuition.

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[4]There was testimony, for example, that the League of Arab Students had used ASUC funds to distribute leaflets in support of the Palestine Liberation Organization, and the UC Polish Dance Club had used ASUC funds to sponsor speakers on current issues in Poland.

Obviously, there are a number of constitutional and practical problems with this approach. Plaintiffs do not explain, in terms of *Keller* and *Abood*, why the funding of the UC Rally Committee (which presumably relates to "students in their capacity as students") is constitutionally permissible, i.e, serves important or substantial state interests, but the funding of Berkeley Students for Peace does not. Nor do plaintiffs adequately explain why scores of student groups which speak to issues pertinent to both the campus and the world at large, like the Native American Student Association and Women in the Sciences, are not germane to the University's mission. Perhaps the most obvious problem with plaintiffs' argument, however (discussed more fully below), is that it denies support to groups, such as those previously mentioned, with much to contribute to the education of University students.

Plaintiff's additional (or possibly alternative) approach is to fund only those groups *not* engaged in what plaintiffs label "political" or "controversial" speech. Plaintiffs assert that *Abood* prohibits, at a minimum, compulsory contributions to political views which they oppose. However, there are legal and practical problems with this standard, as well. Contrary to plaintiffs' contention, *Abood* does not prohibit "political" speech per se. Indeed, the Supreme Court in *Abood* explicitly recognized that an agency shop may take "political" positions in furtherance of its collective bargaining function which its members may be compelled constitutionally to support. As the high court stated: "Union members in both the public and private sectors may find that a variety of union activities conflict with their beliefs. [Citation.] Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective 'political' can properly be attached to those beliefs the critical constitutional inquiry." (431 U.S. at pp. 231-232.) The critical question, rather, was whether the union used mandatory dues to "express political views unrelated to its duties as exclusive bargaining representative." (*Id.* at p. 234.)

Plaintiffs also fail to define "political" in this context or relate it to "students in their capacity as students." An African-American student group which distributes leaflets asserting that the University discriminates against Blacks because it hires too few tenured Black professors is arguably engaged in speech relating to "students in their capacity as students." Yet the leaflet obviously implicates "political" and "controversial" issues relating to race, affirmative action, the validity of statistics to prove discrimination, and the like. Moreover, plaintiffs do not explain where "student" speech ends and "political" speech begins. When Students for a Better Understanding of China sponsors a film which reflects positively on the culture of mainland China, is it speech relating to "students in their capacity as students" or is it "political"? Speech that might seem perfectly innocuous to some could appear highly controversial to others, in this case perhaps to students from Taiwan. The most telling deficiency in plaintiffs' argument, however, is its failure, once again, to articulate any defining theory of the University's mission; accordingly, there is no attempt to explain why the aforementioned Chinese or African-American groups' speech is not germane to the University's mission, but the California Yell Leaders' exhortations are.

(2) The Majority's Response

All of these flaws are manifest in the majority opinion, which concludes that at some undefined point the "educational benefits" of a student group's speech becomes "incidental" to its "political or ideological interests," at which point funding from the mandatory fee becomes unconstitutional. The majority attempt to avoid all of the aforementioned difficulties inherent in this approach—not least of which is articulating meaningful standards for distinguishing between "educationally beneficial" and "political or ideological speech"—by referring the problem back to the Regents of the University (". . . they must ensure that the burdens are justified.") Having done so, the Regents must then institute a "*Hudson*" deduction

(*Teachers v. Hudson, supra,* 475 U.S. 292) permitting students to deduct that portion of their mandatory fee budgeted for "political or ideological" activities.

This analysis is wholly untenable. As a practical matter, it raises a host of unanswered and unanswerable questions; as a legal ruling, it places the University in an impossible position. For example, is a film sponsored by the Chinese Students Association depicting the recent events at Tiananmen Square "educational" or "political"? The majority do not even provide a means of analyzing the question, much less of finding an answer. How would the majority characterize a student-sponsored forum on affirmative action in the University's admissions process, or a leaflet urging the University to divest its holdings in South Africa, or a speaker on the environmental ramifications of logging old-growth timber? Absent any meaningful standards in the majority opinion, how is the University possibly to characterize these activities? And how, moreover, is it to deal with the inflammatory consequences of labeling some groups "educationally beneficial" and therefore eligible for funding through the mandatory fee, while listing others as "political" and therefore ineligible? However the University decides, it will face a renewed barrage of legal challenges.

Perhaps in tacit recognition of these intractable problems, the majority observe that the University is "free" to adopt "another" undefined method of funding, so long as it avoids the constitutional infirmities of funding "political" speech. The irony of the majority's solicitude for academic "freedom" in a decision which does irreparable damage to that principle will not be lost on the reader. In any event, the majority's holding thus comes to this: Expression on campus contributes to the educational mission of the University, but *not* if the "political or ideological" content of the expression exceeds its "educational benefits"; the majority refuse, however, to define this dichotomy; the Regents are in no position to do

so; therefore, on remand the Regents may consider "another" method of funding.

Such reasoning does not do this court credit. If the majority can not define its own standard, it should not ask the University to do so. And if the University is free, as the majority acknowledge, to impose a mandatory fee for certain "educationally beneficial" speech, then it should not be forced, in effect, to adopt an all-voluntary system. For that is the only practical alternative, short of defiance, left to the University: Abolish the student fee, or adopt a "check-off" system which permits each student to contribute to the groups of his or her choice. In either case, funding will soon devolve into a political *popularity* contest. Thus, in a setting where provocative ideas should receive the most support and encouragement, precisely the opposite will occur; student groups will be subject to an ideological referendum, and the most marginal groups will receive the least financial assistance. This is truly Orwellian.

(3) The University's Mission

The University, for its part, submits that its overarching purpose is "to educate" students, and contends that it may constitutionally support activities which further this expansive goal. Student government, lobbying and extracurricular activities groups, the University argues, serve important educational interests by training students in self-government, providing an organized forum to discuss and debate public issues of the day, exposing students to a multiplicity of cultural and political viewpoints and developing social and rhetorical skills.

The University is undoubtedly correct that its essential mission is "to educate" and that student government and extracurricular activities supplement this worthy goal. "Education" is unquestionably a valuable end in itself. But the constitutional issue is whether the University's mission serves an important *state* interest, and whether the funding of student groups engaged in speech which plaintiffs oppose serves reasonably to effectuate that

interest. As explained below, I conclude that both questions must be answered in the affirmative.

That the state derives important benefits from an informed and enlightened citizenry is a proposition almost too familiar to warrant discussion. Political and educational philosophers from Plato to Thomas Jefferson and John Dewey have observed that the principal object of education is to prepare youth for the fullest participation in society. In teaching the *student* the university is simultaneously training the *citizen*. Indeed, they are but two sides of the same coin. To perform responsibly not just as citizen, but as worker, family member, friend and neighbor, a student must acquire both knowledge as well as the critical power of choice and self-direction. A liberal education consists of more than simply achieving an acquaintance with the great poets, philosophers, scientists and statesmen, although that is assuredly an important element; it is also learning the arts of investigation, criticism, discrimination and communication, skills which facilitate a lifetime of learning and social participation.

The work of a university cannot, therefore, be measured strictly in terms of courses, curricula, and examinations. Dewey wrote, "The only way to prepare for social life is to *engage* in social life." (Dewey, Moral Principles in Education (1909), p. 14, italics added.) As valuable as the pursuit of knowledge is for its own sake, the university also has a major responsibility for the development of an enlightened and engaged citizenry. Neglect this duty, and apathy and incivility will surely result.

Thomas Jefferson spoke often of the critical role higher education plays in preserving a republic of free, informed and self-reliant citizens. As he observed in characteristically pithy fashion: "If a nation expects to be ignorant and free, in a state of civilization, it expects what

never was and never will be."[5] Consistent with these views, Jefferson considered the founding of the University of Virginia to be among his most notable legacies, for the future of the nation ultimately depended on the knowledge and civic values of each succeeding generation. As the United States Supreme Court recently observed: "Each generation must learn anew . . . the ideas and aspirations" which the Constitution's written terms embody. (*Planned Parenthood v. Casey* (1992) ___ U.S. ___, ___ (112 S.Ct. 2791, 2833.) Foremost among these "lessons" is the importance of toleration. "To endure the speech of false ideas . . . and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry." (*Lee v. Weisman* (1992) ___ U.S. ___ (112 S.Ct. 2649, 2657.)

Although these thoughts are conventional, their implications for the constitutional issues before us are significant. For if, as I believe, the nation's fundamental civic values are forged in the intellectual fires of its college campuses, then clearly the University's educational mission serves an important if not compelling governmental interest. And if, as I further believe, the ability to form and express one's own opinions and tolerate those of others lies at the heart of a free society, then the mandatory student fee clearly serves to effectuate this transcendent national interest, by contributing to the nearly limitless variety of speech and opinion on the university campus.

Without such funding, moreover, I have no doubt that the campus would lose much of the diversity which is its lifeblood. The practical realities cannot be ignored. The wherewithal to fund even a modest program lies beyond the limited means of most student groups. Remove the mandatory fee and centralized ASUC distribution, and funding would rapidly become a balkanized affair dependent on the vicissitudes of private donations and the fortuity of wealth. By divorcing the University from the

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[5]The Great Quotations (Seldes ed. 1983) p. 367.

funding process, furthermore, "students would cease to be linked by a common bond to the tolerant support of all points of view." (*Carroll v. Blinken*, *supra*, 957 F.2d at p. 1002.) Therefore, I conclude that the modest mandatory fee which affords every student group the opportunity to sponsor films and speakers, to produce and distribute leaflets and flyers, is a reasonable and necessary means of effectuating the University's vital national mission.

Obviously, not all of the speech and activities funded by the mandatory student fee will be agreeable to all of the students all of the time. However, as *Keller* and *Abood* instruct, the critical question is not whether speech is controversial or commands the assent of every student, but whether it serves reasonably to effectuate the University's compelling educational mission. Subject to the limitations set forth below, I would hold that it does.[6]

E. Restrictions on the Use of the Mandatory Fee

The University's discretion to fund student activities through the mandatory fee is not without limit. On the contrary, as noted earlier the interests that justify the mandatory fee define the uses to which it may legitimately be put. The University's goal is to encourage a diversity of expression on campus, not to promote a particular ideological orthodoxy or partisan agenda. As the University's own policies provide, therefore, funding of student government and student activities groups and

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[6]I note, in passing, that infringements of the nature at issue here occur routinely at a university, indeed, they can hardly be avoided. When a university hires a professor based, in part, on his or her academic philosophy, when it selects courses for inclusion in the curriculum, when it invites speakers from outside the academic community to address issues of public interest, it necessarily expends funds provided by students to promote speech and ideas which some students may oppose. (*See Kania v. Fordham* (4th Cir. 1983) 702 F.2d 475, 480, fn. 9.) So long as the university neither seeks by these expenditures to impose a particular ideological orthodoxy nor to stifle intellectual debate, such educational judgments can not justifiably be questioned.

operations must be neutral and must not be used to support political candidates or ballot measures. Indeed, the use of such funds for partisan political purposes would violate the strictures of our holding in *Stanson v. Mott* (1976) 17 Cal.3d 206, 209-210, that absent "clear and explicit legislative authorization, a public agency may not expend public funds to promote a partisan position in an election campaign."[7]

Nor should the mandatory fee be used to support student activities groups engaged in expressive activities *off campus*, including the currently funded ASUC lobbies. The purpose of the mandatory fee is to expose students to a diversity of views and to facilitate direct student participation in the University's ongoing intellectual discourse. Off-campus expression may be just as educational as on-campus speech for those involved, but the critical difference is that it benefits *only* those involved; it does not contribute to the campus discussion of ideas, and other students do not have the opportunity to hear and debate the views of off-campus speakers.[8]

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[7]Although the trial court found "isolated instances in the past" where the rule against funding partisan activities had been violated, it concluded that the relatively few infractions and the absence of any "pattern of neglect or likelihood of recurrence" militated against equitable relief. The award of declaratory or injunctive relief is entrusted to the sound discretion of the trial court and will not be disturbed absent a clear abuse of that discretion. (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286; *In re Marriage of Connolly* (1979) 23 Cal.3d 590, 598.) The test is whether the trial court "exceeded the bounds of all reason, all of the circumstances before it being considered." (*In re Marriage of Connolly, supra*, 23 Cal.3d at p. 598; see Code Civ. Proc., §§ 1060, 1061.) Here, in light of the findings that the infractions relating to partisan funding were de minimis and would not be repeated, I cannot say that the trial court clearly abused its discretion in denying relief.

[8]Off-campus activities that are not designed to facilitate speech in any meaningful sense, such as travel expenses incurred by the Berkeley Chess Club to attend a chess match at another campus, may continue to be funded as they do not raise First Amendment concerns relating to compelled speech.

Finally, inasmuch as the purpose of the University is to serve as a "marketplace of ideas" in which students are encouraged to speak and participate, any use of the mandatory fees to *interfere* with such expression would also exceed the constitutional mandate. Thus, the University may properly deny funds to any group or activity which violates reasonable time, place and manner regulations or otherwise threatens to disrupt the educational process. As the United States Supreme Court has stated, "Associational activities need not be tolerated when they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education." (*Healy v. James, supra,* 408 U.S. 169, 189.) For example, the funding of activities designed to deny access to a particular course or professor would exceed the constitutionally permissible uses of the mandatory student fee. And when advocacy presents an imminent threat to campus order through the promotion of racial genocide, for example, the University may properly deny recognition and funding. (*Id.* at pp. 189-192.)

F. The Case Law Concerning Mandatory Student Fees

The foregoing analysis is consistent with *every reported decision* involving First Amendment challenges to the collection and use of a general mandatory student activities fee. Indeed, it closely tracks that of Judge Kaufman for the Second Circuit Court of Appeals in the most recent decision to date, *Carroll v. Blinken, supra,* 957 F.2d 991, 1001, certiorari denied ___ U.S. ___ [121 L.Ed.2d 224]. There, state university students sought to enjoin as unconstitutional under *Keller* and *Abood* the use of a portion of their mandatory student fee ($55 per semester) to fund a particular student organization, the New York Public Interest Group (NYPIRG). There, as here, the federal court noted that the mandatory fee was used to fund a great variety of student groups, "including athletic, social, recreational, service, ethnic and political organizations." (*Id.* at p. 993.) While acknowledging the First Amendment

intrusion on dissenting students, the court of appeals concluded that the University's mission amply justified the infringement. "A university where NYPIRG petitions against nuclear power, where environmental groups advocate greater recycling, where opponents of South Africa debate opponents of divestment, and partisans of a dozen other causes press their cases is a university fulfilling its traditional mission in a free society. Were it otherwise, college would be a very quiet, intellectually diminished and ultimately irrelevant place." (*Id.* at p. 1001.)[9]

Although the federal court thus upheld the use of the mandatory fee to support NYPIRG's on-campus activities, it disallowed the use of such funds for its off-campus lobbying and statewide administrative costs. As the court explained: "Students opposed to NYPIRG can be made to tolerate some compromise of their First Amendment rights when the benefits of a varied extracurricular life, hands-on civics training, and robust campus debate are all around them to approvingly take part in, actively oppose, or merely witness dispassionately firsthand. [Citations.] These benefits vanish when NYPIRG money is spent in the halls of the state legislature or at the main offices in New York City. SUNY Albany's interests, however substantial, are still, after all, those of the university and its community, not that of an independent statewide organization." (*Carroll v. Blinken, supra,* 957 F.2d at p. 1002.)[10]

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[9]Contrary to the implication in the majority opinion, the Court of Appeal in *Carroll* did not premise its holding on the fact that NYPIRG promoted "educational" rather than "ideological" causes. On the contrary, the *Carroll* court recognized that despite its self-description as "non-partisan" NYPIRG pursued clearly political ends, as did the "partisans of a dozen other causes" on campus. (957 F.2d at p. 1001.) Nevertheless, the court concluded that such groups were integral to the university's goal of "fulfilling its traditional mission in a free society." (*Ibid.*)

[10]The majority are correct that the *Carroll* court "balanced" the benefits

(continued...)

Kania v. Fordham, supra, 702 F.2d 475 also involved a challenge by state university students from the University of North Carolina to the use of their mandatory student fees. Relying on *Abood,* the students charged that the partial funding of a student newspaper compelled them to support views with which they disagreed, in violation of the First Amendment. The federal circuit court rejected the challenge, holding that "funding by mandatory student fees is the least restrictive means of accomplishing an important part of the University's central purpose, the education of its students." (*Id.* at p. 480.) In this regard, the court noted a "crucial distinction between *Abood* and the present case" lay in the fact that the "mandatory fees in *Abood* . . . enhanced the power of one, and only one, ideological group to further its political goals. In contrast, [the student newspaper] increases the overall exchange of information, ideas, and opinions on the campus." (*Ibid.*)

Although rendered prior to *Keller* and *Abood,* a number of state decisions have also rejected First Amendment challenges to the use of mandatory student fees. In *Larson v. Board of Regents of University of Neb.* (1973) 189 Neb. 688 [204 N.W.2d 568], state university students relied on an important predecessor to *Abood, International Assn. of Machinists v. Street, supra,* 367 U.S. 740,[11] to challenge as unconstitutional the use of mandatory student fees to fund the student newspaper and speakers program, alleging that the "mandatory fee system require[d] them to contribute to the support of political views and doctrines with which they disagree[d]." (204 N.W. 2d at p. 570.) Applying what was for all intents and purposes an *Abood*

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[10](...continued)
that NYPIRG and other activities groups offered to students against the infringement of the dissenting students' rights. But contrary to the majority's implication, the *Carroll* court weighed the balance in favor of the university, holding that funding such "athletic, social, recreational, service, ethnic and political organizations" served sufficiently important interests to justify the infringement. (957 F.2d at p. 993.)

[11]See footnote 2, *ante,* at page __ [typed dis. opn. at p. 13].

analysis, the Nebraska Supreme Court rejected the claim, concluding there were "important distinction[s] between the political activities of a labor union and extracurricular activities at a university." (*Ibid.*) "Within reasonable limits, it is appropriate that many different points of view be presented to the students." (*Id.*, 204 N.W.2d at p. 571.)

Lace v. University of Vermont (Vt. 1973) 303 A.2d 475 is similar. There, state university students alleged that the use of their mandatory student fee, which funded over 100 student activities groups, a speakers bureau and the campus newspaper violated their First Amendment rights by compelling them to support "'persons advocating positions and views with which they wholly disagree.'" (*Id.* at p. 477.) Distinguishing the labor union situation, the Vermont Supreme Court upheld the expenditures as a means of encouraging "various and divergent student organizations to inject a spectrum of ideas into the campus community." (*Id.* at p. 479.) And in *Good v. Associated Students of Univ. of Washington* (1975) 86 Wn.2d 94 [542 P.2d 762], the Washington Supreme Court rejected a similar First Amendment challenge, holding that the use of a mandatory student fee to support a campus speakers bureau, student resolutions on contemporary political issues and other extracurricular activities groups served the paramount educational goal of promoting "an infinite range of ideas, theories and beliefs." (*Id.*, 542 P.2d at p. 769; see also *Arrington v. Taylor* (M.D.N.C. 1974) 380 F.Supp. 1348, 1364 [distinguishing the use of mandatory student fees to provide "a forum wherein others may express their views" from the use of mandatory dues by a state bar or labor union]; *Veed v. Schwartzkopf* (D.Neb. 1973) 353 F.Supp. 149, aff'd. without opinion, 478 F.2d 1407 (8th Cir. 1973), cert. denied (1974) 414 U.S. 1135 [university is not constitutionally prohibited from use of mandatory student fees to support student association, newspaper and speakers program which provide a forum for the expression of divergent opinions]; see also *Cantor, supra,* 36 Rutgers L. Rev. at pp. 46-51; Note, *"Fee Speech": First Amendment Limitations on Student Fee Expenditures* (1984) 20 Cal. Western

L. Rev. 279; Gibbs & Crisp, *The Question of First Amendment Rights vs. Mandatory Student Activities Fees* (1979) 8 J. L. & Ed. 185.).)

Galda v. Rutgers (3rd Cir. 1985) 772 F.2d 1060, on which plaintiffs chiefly rely, is inapposite. There, the court held that a separate mandatory fee imposed for the sole purpose of supporting one organization, the New Jersey Public Interest Research Group (NJPIRG), which was otherwise *ineligible* to receive money from the general student activities fee because it was an independent rather than a student organization, infringed the plaintiffs' First Amendment rights. In so ruling, however, the *Galda* court emphasized that its holding was "a narrow one and may perhaps best be explained by eliminating what is not at stake. *This case does not address the problem presented by a state university's allocation of a mandatory non-refundable student activity fee.* We are not concerned here with the question whether an organization with [NJ] PIRG's philosophic outlook may be funded through the general activities fund as are other campus organizations representing diverse views. [¶] In short, we do not enter the controversy on whether a given campus organization may participate in the general activities fee despite the objections of some who are required to contribute to that fund. See, e.g., *Kania v. Fordham*, 702 F.2d 475 (4th Cir. 1983 . . . ." (*Id.* at p. 1064, italics added.)

Galda v. Rutgers, supra, 772 F.2d 1060, held only that a separate assessment to support *one* organization which expressed only *one* viewpoint violated the First Amendment rights of dissenting students. In so holding, it again emphasized the distinction between the special funding of NJPIRG, and the traditional funding of campus groups through a general student activities fee. As the court explained: "There is room for argument that a university's role of presenting a variety of ideas *is a sufficiently compelling reason for some infringement of First Amendment rights just as is the need for labor peace in the union dues cases.* That contention loses its force, however, when

an outside organization independent of a university and dedicated to advancing one position, is entitled to compelled contributions . . . . In that situation a university's ability to insure a balance in access is infringed, if not prevented, in some circumstances and the quid pro quod for payment to a forum disappears. [¶] Generally, when an activity fund comes into existence, all student groups on campus are free to compete for a fair share. That is not the situation here where the mandated contribution is earmarked for only one organization, an organization which has no obligation to use any part of the fund for the benefit of a group which pursues a different philosophy." (772 F.2d at p. 1067, italics added.)

We are not confronted here with a separate mandatory assessment earmarked for one independent organization, but rather a general student activities fee in which "all student groups on campus are free to compete for a fair share." (*Galda v. Rutgers, supra,* 772 F.2d at p. 1067.) Thus, as *Galda* itself repeatedly emphasizes, that case is not apposite to our decision.[12]

G. Constitutionally Compelled Administrative Procedures

The analysis does not end with the conclusion that certain activities may be funded through the mandatory student fee and others may not. As noted earlier, the United States Supreme Court has outlined a minimum set of procedures by which a union or integrated bar may meet its constitutionally compelled requirement of assuring that compulsory dues are not expended on nongermane activities. The high court summarized these procedures in

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[12]In light of *Galda*'s clear, repeated and unequivocal statements that it was *not* considering the problem represented by a general student activities fee (772 F.2d at p. 1064), and its intimation that it would *uphold* such a fee if the issue were presented (*id.* at p. 1067), the majority's statement that "there is nothing in the Third Circuit's approach that prevents its application to on-campus student groups," defies comprehension.

Teachers v. Hudson, supra, 475 U.S. 292, as follows: "[T]he constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." (*Id.* at p. 310; see *Keller v. State Bar, supra,* 496 U.S. at pp. 16-17; see also *Gibson v. The Florida Bar* (11th Cir. 1990) 906 F.2d 624, 627-633, cert. granted Mar. 18, 1991, cert. dis. as improv. granted Dec. 4, 1991.)

As discussed above, the University's discretion to fund student activities through the mandatory fee is not without constitutional limits. These include expenditures to support partisan political candidates or ballot measures, off-campus activities, and activities which interfere with the freedom of expression of other members of the campus community. Students who believe that a proposed expenditure violates these constitutional restrictions should have a convenient and expedient means of challenging it. Although we do not have a fully developed record regarding the University's fee setting and collection process, I believe, as the high court observed in *Keller, supra,* 496 U.S. 1, that the University "could certainly meet its *Abood* obligation by adopting the sort of procedures described in *Hudson.*" (496 U.S. at p. 17.) I note in this regard that the ASUC already prepares a detailed annual budget, including line item expenditures of student activities groups, which must be reviewed and approved by the ASUC Senate and the University. An appropriate remedial system would provide for general notice of the approved budget, the opportunity to file a written objection to a particular expenditure within a specified time period, an escrow for the pro rata amount of the objecting students' fees at issue pending determination of the merits of the objection, and an impartial arbitration panel. (See *Gibson v. The Florida Bar, supra,* 906 F.2d at pp. 627-632.) As in *Keller,* however, I would leave open the question whether one or more alternative procedures tailored to the University's unique

conditions would likewise satisfy its constitutional obligations. (496 U.S. at p. 17.)

H. Authority to Impose the Student Fee

Plaintiffs also assert that the University lacks the requisite statutory and constitutional authority to impose a mandatory student activities fee. Several grounds are advanced to support this claim. As will appear, none is meritorious.

Originally created by statute in 1867 (Stats. 1867-1868, ch. 244, p. 248), the University of California achieved constitutional status in 1879. (Cal. Const., art IX, § 9.) The California Constitution declares the University of California to be a "public trust" and places its governance in the hands of the Regents. (Cal. Const., art. IX, § 9, subd. (a).) The Regents are vested with "the legal title and the management and disposition of the property of the university . . . ." (Cal. Const., art. IX, § 9, subd. (f).) The Regents' authority includes "all the powers necessary or convenient for the effective administration of its trust, including the power . . . to delegate to its committees or to the faculty of the university, or to others, such authority or functions as it may deem wise . . . ." (*Ibid.*) The courts have construed this constitutional authority as giving the Regents "virtual autonomy in self-governance." (*Regents of University of California v. City of Santa Monica* (1978) 77 Cal.App.3d 130, 135; accord *Cal. State Employees' Assn. v. Regents of University of California* (1968) 267 Cal.App.2d 667, 671.) As we have stated: "[T]he power of the Regents to operate, control and administer the University is virtually exclusive." (*San Francisco Labor Council v. Regents of University of California* (1980) 26 Cal.3d 785, 788 [internal quotation marks omitted].)

In light of these provisions, plaintiffs' assertion that the University lacks the requisite authority to impose a mandatory student fee is patently without merit. The Legislature has expressly authorized the creation of a student body organization and the collection of mandatory

student activities fees for the California State University system. (Ed. Code, § 89300.) The funds collected may be used "for such purposes of the student body organization as are approved by the trustees." (Ed. Code, § 89302.) Although parallel statutory provisions are not provided for the University, none is needed. The University is a constitutional entity whose powers derive therefrom. The Regents' authority to exercise "all the powers necessary or convenient for the effective administration of its trust, including the power . . . to delegate to its committees or to the faculty of the university, or to others, such authority or functions, as it may deem wise. . . ." (Cal. Const., art. IX, § 9, subds. (a), (f)), plainly encompasses the power to authorize the adoption, by a vote of two-thirds of the student body, a mandatory activities fee similar to that of the state college system.

Plaintiffs further contend that the Regents have exceeded their constitutional mandate by delegating to the ASUC, which they characterize as a "private entity," the authority to administer and manage the student funds. On the contrary, the ASUC is clearly a creature of the University; the Regents authorized it, and retain ultimate responsibility for its supervision of student affairs. The chancellor, by virtue of the authority of the Regents, regularly monitors the ASUC Senate and oversees and approves the annual ASUC budget. Moreover, under the University's written policies, the chancellor is empowered to "make audits of the finances of student governments, exercise control over expenditure of their funds . . . and where necessary may take action to ensure that any activity under control of student governments is operated in accordance with sound practices . . ." Thus, the ASUC plainly acts under the authority and close supervision of the Regents and the University.

Relying on this court's decision in *Stanson v. Mott, supra,* 17 Cal. 3d 206, petitioners further contend that the University lacks clear and explicit authority to use public funds for partisan campaign purposes. *Stanson* held that a

public agency requires "clear and explicit" legislative authority to engage in what it characterized as "informational" lobbying (*id.* at pp. 209-210), and suggested, without holding, that the use of public funds for partisan campaigning presented a "serious constitutional question." (*Id.* at p. 219.) Applying these principles, we held that the Director of the California Department of Parks and Recreation had exceeded his authority in authorizing the expenditure of more than $5,000 of public funds to promote passage of a bond issue for the acquisition of park land and recreational facilities. (*Id.* at p. 220.)

Although the ASUC Senate may adopt resolutions on political issues, the University does not sanction the expenditure of ASUC revenues to fund partisan election campaigning. Moreover, as previously noted, there is clear and express constitutional authority authorizing the expenditure of funds for the ASUC student government. (Cal. Const., art. IX, § 9, subd. (f).) *Stanson v. Mott, supra,* 17 Cal.3d 206, is thus inapposite.

Plaintiffs also assert that use of the mandatory activities fee to subsidize student religious groups violates the establishment clause (U.S. Const., Amend. I; Cal. Const., art. I, § 4.) and article IX, section 9, subdivision (f) of the California Constitution, which states that the University "shall be entirely independent of all political or sectarian influence . . . ." As earlier noted, the trial court made a factual finding, sustained by the record, that while some religious groups had registered with the University, no group whose activities are essentially religious in nature, i.e., devoted to proselytizing, conducting religious services or restricting membership to persons of a particular faith, had received ASUC funds. Nor has the University violated the constitutional injunction against political "influence." This section, by its terms, proscribes partisan interference in the internal affairs of the University, not political activity by the University. Moreover, as previously discussed, the ASUC may not fund activities designed to advance partisan

political positions. Thus, the mandatory student fee does not contravene the political neutrality clause.[13]

CONCLUSION

The Reverend Martin Luther King, Jr. once said, "Morality cannot be legislated but behavior can be regulated. Judicial decrees may not change the heart, but they can restrain the heartless."

Our role as guardians of the law and of the Constitution charges us with the duty of safeguarding against unwarranted encroachments of others' rights by those who require restraint.

We are given here the solemn opportunity of enriching the spirit of liberty by shielding all persons against the imposition of an educational philosophy based on cynicism and divisiveness by fashioning a decree which fosters the concept of community as opposed to constructing a wall of separatism. This we have failed to do. We have lost the light of wisdom and diminished our noble heritage.

I acknowledge that the resolution of conflicting interests that I have set forth may not satisfy those who prefer First Amendment absolutes. I believe, however, that it is faithful to the principles of *Keller* and *Abood*, fair to both the University's and the nation's needs, and mindful of

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[13]Plaintiffs also cite section 13 of the Organic Act establishing the University of California (Stats. 1867-1868, ch. 244, § 13, p. 254), which provided in pertinent part: "[N]o sectarian, political or partisan test shall ever be allowed or exercised in the appointment of Regents, or in the election of professors, teachers, or other officers of the University, or in the admission of students thereto, or for any purpose whatsoever . . . ." Although the Organic Act was expressly incorporated into the 1879 version of article IX, section 9 of the California Constitution, a 1918 constitutional amendment deleted any reference thereto. Plaintiffs nevertheless urge that the provisions of the Organic Act remain in effect. Even assuming, without purporting to decide, that this is the case, the record is barren of any evidence that students are subject to "political, sectarian or political" tests for admission.

petitioners' right to be free of that compelled speech not germane to those concerns. Therefore, subject to the limitations previously discussed, I would affirm the judgment of the Court of Appeal.

ARABIAN, J.

I CONCUR:

MOSK, J.

SUPREME COURT
FILED
APRIL 15, 1993

Robert Wandruff Clerk

DEPUTY

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

AVERELL SMITH Et Al., *Appellants*

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA Et Al.,
Respondents

Petitions for rehearing DENIED. Opinion modified.

Mosk, J. and Arabian, J. are of the opinion rehearing should be granted.

Chief Justice

SUPREME COURT
FILED
APR 15, 1993

Robert Wandruff Clerk

DEPUTY

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

AVERELL SMITH et al.,	S006588
Plaintiffs and Appellants,	(Court of Appeal No. A020533)
v.	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,	(Superior Court Nos. 0519977 and 533997)
Defendants and Respondents.	
ASSOCIATED STUDENTS OF THE UNIVERSITY OF CALIFORNIA,	
Plaintiff,	
v.	
THE SMALL CLAIMS COURT FOR THE BERKELEY-ALBANY JUDICIAL DISTRICT OF ALAMEDA COUNTY,	
Defendant;	
BRAD SPARKS et al.,	
Real Parties in Interest.	

MODIFICATION OF OPINION

By The Court:

The opinion herein, appearing at 4 Cal.4th 843, is modified as follows:

At page 859, in the second full paragraph, at the end of the second sentence (after the words "other students' political activity"), a footnote is added, reading:

"*Widmar v. Vincent* (1981) 454 U.S. 269, which the Regents and the ASUC cite, does not compel a contrary conclusion. There, the high court held that a state university that made its facilities generally available for the activities of student groups could not close its facilities to one group because of its religious nature. But the high court did not hold that the university was required to create a forum generally open to student groups, let alone a particular type of forum. And the high court's opinion, while mentioning that the groups in question were funded by a student activities fee (*id.* at p. 265), said nothing about the propriety of such funding or the problem of compelled speech."

This modification requires renumbering the later footnotes. It does not effect a change in the judgment.

SUPREME COURT
FILED
MARCH 26, 1992
Robert Wandruff Clerk

DEPUTY

ORDER GRANTING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL
First Appellate District, Division One,
No. A020553 - S006588
IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

AVERELL SMITH et al.,
Appellants
v.
REGENTS OF THE UNIVERSITY OF CALIFORNIA et al.,
Respondents

Petition for review GRANTED.

Chief Justice

PANELLI
Associate Justice

KENNARD
Associate Justice

ARABIAN
Associate Justice

GEORGE
Associate Justice

Associate Justice

Associate Justice

FILED
JAN 13, 1992

Court of Appeal - First App. Dist.

By RON D. BARROW
Deputy

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

AVERELL SMITH et al.,

Plaintiffs and Appellants,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA et al.,

Defendants and Respondents.

A020553
(Alameda County
Super. Ct.
Nos. 519977-2
and 533997-6)

This action challenges the validity of a mandatory student activities fee, collected by the University of California, Berkeley and used to fund certain activities of the student body organization, the Associated Students of the University of California (ASUC).

STATEMENT OF THE CASE

In 1979, four plaintiffs filed suit in superior court for declaratory and injunctive relief against the University and ASUC seeking to have the mandatory activities fee imposed upon all students who attend the University of California at Berkeley declared unconstitutional and in violation of statute. (*Smith v. Regents*, No. 519977-2) In 1980, 32 students from UC Berkeley sued ASUC in small claims court seeking a refund of the activities fee. In response, ASUC filed suit in superior court to enjoin the small claims actions. (*ASUC v. Sparks*, No. 533997-6.) The Smith case and Sparks case were eventually consolidated.

In 1982, the trial court granted a partial summary adjudication in favor of defendants UC and ASUC.[1] The court concluded that "the mandatory student activities fee imposed on all students at the University of California, Berkeley, is constitutional and legal on its face and as applied." This order was interpreted as resolving issues of imposition and collection of the fees. Left unresolved were issues relating to the expenditure and use of those fees. For those issues, a trial was held without a jury. The trial court ruled that the use of the fee to provide financial support for the ASUC activities was not invalid. Judgment was entered in favor of defendants UC and ASUC.

Plaintiffs appealed to this court, and in 1988 this court affirmed the trial court's ruling. The California Supreme Court, however, granted review and held the case until the United States Supreme Court decided *Keller v.*

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[1]For the sake of convenience, the students will be referred to as "plaintiffs" and the university and ASUC as "defendants."

State Bar of California (1990) ___ U.S. ___ [110 S.Ct. 2228, 110 L.Ed.2d 1]. The California Supreme Court then retransferred the case to this court for reconsideration in light of *Keller*. For the reasons explained herein, we have concluded that *Keller* does not lead to a different result. Accordingly, we affirm the judgment.

FACTS

For purposes of this appeal, we are bound by the established rules of appellate review and must view all factual matters in the light most favorable to the prevailing party and in support of the judgment. (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925-926.) We recite the facts accordingly.

Since 1955, all students enrolling in the University of California, Berkeley, have been required to pay a student activities fee as a condition of enrollment. At the time of the trial (1982), the fee was $12.50 per quarter. Of that amount, the university retains $4 to pay off the bonds which financed the construction of the Student Union building on the Berkeley campus. The remainder is transferred to the ASUC: $1.50 to support the Ethnic Studies Program and $7 to finance the student government and student activities.

Since the early 1900's, the ASUC has been recognized by the university as the entity responsible for administration and management of student government and student activities on the Berkeley campus. The ASUC is a nonprofit, unincorporated association, with a full-time staff of approximately 85-90 persons and a part-time staff of 250-400 persons, most of whom are students.

In addition to administering the student government and student activities, the ASUC also owns and operates a bookstore on campus and a ski lodge at Norden, California. It also manages the student union

building and Eshelman Hall. The revenues from these business enterprises supplement the student activities fees.[2]

1. Student Government

The ASUC operates a student government through the ASUC Senate, a legislative (policy-making) body composed of 30 elected student representatives. An adjunct body, the Graduate Assembly (representing graduate students), is made up of representatives elected by the various graduate departments. Two delegates from the Graduate Assembly are members of the ASUC Senate.

The ASUC Senate meets weekly during the school year. Occasionally, controversial public issues are brought before the Senate for debate, and a resolution is adopted expressing the "position of the ASUC." For example, during the several years preceding trial, the ASUC Senate passed resolutions to express ASUC's support of Amnesty International's campaign against political prisoners in Indonesia, support of gay and lesbian rights, the ERA, gun control, the reelection of Ron Dellums, and a Berkeley marijuana initiative. And it adopted resolutions opposing torture in Uruguay, nuclear power, and draft registration.[3]

University officials have consistently viewed the ASUC Senate resolutions on matters of public concern as compatible with university rules or regulations. The university's written policies declare in pertinent part: "Student governments shall have the right to address and take positions on public issues. Positions on issues taken by student governments shall not be represented as or

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[2]In 1981-1982, for example, the total amount spent by ASUC to support student government, student activities groups and student operations was $1,016,505. Of that, $607,635 was collected from the quarterly student activities fee; the remainder came from other revenues.

[3]The ASUC has adopted a policy of "social responsibility" in the operation of its commercial facilities. Thus, ASUC will not do business with companies that invest in South Africa, and it supports the boycotts of Coors beer, Nestle's Products, and Dole produce.

deemed to be official positions of the University. Compulsory student fees shall not be expended in support of such positions except for University-related purposes." Thus, what the university does not allow is the direct contribution of funds to support a particular cause. The resolutions on public issues adopted by the ASUC Senate comply with the University's policies. They do not involve the expenditure of funds, nor do they purport to represent the position of the university.

Moreover, university officials deem the ASUC student government an important part of the university's educational mission in that it serves to teach students about government; it enables students to participate in governmental decision-making; and it exposes students to the presentation of diverse views.

2. Student Activities Groups

The ASUC provides funding to about 150 student activities groups. These student activities groups run the gamut from yell leaders and bicycle enthusiasts to Polish folk dancers. Many of the groups advocate positions on political and ideological matters.[4]

The activities of these groups are confined to campus. The groups attempt to educate fellow students about current issues and to generate debate. They express their views by printing and/or distributing literature, staffing tables at Sproul Plaza, holding rallies or forums with one or more speakers, showing films and so on. Some

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[4]For example, Amnesty International; Berkeley Students for Peace; Campus N.O.W.; Campus Abortion Rights Action League; Conservation and Natural Resources Study Student Organization; East Bay Right to Life; Gay and Lesbian Union; Greenpeace Berkeley; Iranian Students Association; Progressive Students Organization; Radical Education and Action Project; Spartacus Youth League; Students Against Intervention in El Salvador; Students for Economic Democracy; UC Berkeley Feminist Alliance and Women Organized Against Sexual Harassment; UC Campus Sierra Club.

groups also urge political action: they circulate petitions and encourage students to send letters or postcards to government officials. None of the student groups purport to express the position of the university or of ASUC.

In order to obtain ASUC funding or to use university facilities, a student group must first register with the university. That is, it must submit a copy of its constitution and the name of its student representative. In this way, the university ensures that group members are in fact students and that the group complies with university rules and regulations.[5] Any four students may form a group and register with the university, but registration is not required unless the group wants ASUC funding or wants to make use of university facilities.

Once registered, any student group seeking ASUC funding must submit an application for funding to the ASUC Finance Committee, identifying the group's membership, its membership requirements, its goals and a line/item request for expenditures. The ASUC Finance Committee (composed entirely of students) reviews and investigates each application in accordance with the written ASUC guidelines to determine whether to approve the funding application. The written guidelines provide, inter alia, as follows: "The requested funds shall be used for purposes or programs related to the University or beneficial to the student body of the University of California. . . . [¶] The requested funds shall not be used for purposes or programs connected with partisan political activities or any ballot measure with the exception of non-partisan educational forums on issues of interest."

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[5]One group, for example, the Revolutionary Communist Youth Brigade, was denied registration as a student group because of its disruptive behavior in classes.

Thus, student groups supporting partisan political activities (e.g., the Young Republicans or the Young Democrats) are not funded.[6] Nor are religious proselytizing groups funded, although student activities groups with religious names (e.g., the Jewish Student Board, the Hindu Students Association, and the Moslem Students Society) are funded if the funds are used for cultural and educational activities and not for the expression or practice of religion.[7]

The Finance Committee recommendations are considered and passed upon by the full ASUC Senate as part of the annual ASUC budget.

Funding of student activities groups is content neutral. There is no evidence that funding was approved or denied on account of a group's position on a particular issue. Except as noted, any group is eligible for funding no matter what its political or ideological orientation.

Student activity groups are funded only on a reimbursement basis. That is, each group must submit a voucher for reimbursement (or direct payment to a supplier) of every expense. Payment is made only if the expense is consistent with the line/item budget approved by the ASUC Senate.[8] No funds are transferred directly to student

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[6]Plaintiffs contended that at least one funded student group, the Students for Economic Democracy, had endorsed certain candidates for the Berkeley City Council. But there was testimony that while certain individual members of the group had done so, the organization itself did not. Moreover, the group was not funded at the time.

[7]Funding would not be approved if membership was discriminatory. The ASUC guidelines provide that the organization must be "open to all duly registered students of the University . . . and [the organization's documents] shall contain no provision limiting membership to any specific group or class or persons or otherwise discriminating against any student on the basis of race, creed, religion, ethnicity, sex or sexual persuasion."

[8]Line/item expenses eligible for funding are personal services; stationery and supplies; telephone; travel; dues and subscriptions; postage; equipment rental; advertising; programs and printing; facilities rental; and other related expenses.

groups, nor are students groups permitted to maintain bank accounts.[9]

In the view of university officials, the funding of the student activities groups creates a forum for the exchange of ideas and serves an educational purpose. Moreover, the political advocacy activities of the student groups are considered by university officials to be in accordance with the regulations. All student groups are required to file with ASUC mid-year reports of their activities. Failure to file those reports subjects that group to suspension of its unspent funds. Funds will also be suspended if the group violates any university or ASUC rule or regulation. The ASUC finance officer testified that none of the groups particularly challenged by plaintiffs (fn. 4, *ante*) violate any university or ASUC rules or regulations.

3. ASUC Operations

In addition to funding student activity groups, the ASUC sponsors certain student-run operations, usually managed by a professional staff. Funding for these operations is handled differently from the funding for the student activities groups, as the student operations are part of ASUC. Budget requests for student operations are routed to the ASUC executive director and to the ASUC Operations Committee, which makes recommendations to the ASUC Senate.

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[9]In addition to monetary funding, the ASUC provides office space to some student groups. Eshelman Hall is dedicated to ASUC functions, and the fifth and sixth floors contain offices which are made available for student groups. On average, three groups share a single office.

Although university guidelines prohibit the use of university facilities "for organizing and maintaining personal political activities," university officials take the position that offices in Eshelman Hall are ASUC offices (not university offices) and thus are not governed by this prohibition.

The ASUC operations serve to provide information to the students and to represent the views of students to the community. The activities and policies of these operations groups are monitored by oversight committees of the ASUC Senate.

At the time of trial, the funded ASUC operations included the following:

(1) A draft counseling center.

(2) A recycling project.

(3) A renters' assistance project, which assists students in small claims actions and gives information to students about their rights as tenants. It also presents the student viewpoint at local agencies, e.g., the Berkeley Rent Stabilization Board, concerning proposed rent increases.

(4) An academic affairs office, which represents the student viewpoint to the faculty's Academic Senate.

(5) A campus affairs office, which works with the university and participates in university planning, e.g., advocating more student housing and urging the university not to cut basic student services in its budget reductions.

(6) A voter registration project, which mailed brochures to students alerting them to the ballot issues and encouraging them to register and to vote.[10]

ASUC also funds student lobbying organizations. The U.C. Student Lobby works with representatives of other UC campuses on student-related issues before the State Legislature and state administrative agencies.[11] This lobbying group, for example, opposed legislation that would prohibit the use of registration fees to fund

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[10]One brochure gave a telephone number to call "for assistance." The number was that of Congressman Dellums's office.

[11]The student body organizations for the state university system and for the state community colleges also maintain lobbies in Sacramento supported by student activities fees.

abortions, supported legislation prohibiting discrimination against students in rental housing, opposed legislation prohibiting mandatory student fees for student activities groups, and supported legislation reducing the budget cuts for the university.[12] The Berkeley Annex of the U.C. Student Lobby works on campus to publicize the positions taken by the U.C. Student Lobby and to encourage students to write to their legislators. The Municipal Lobby lobbies local Berkeley city agencies on issues relating to students, especially on issues related to housing, rent control, restrictions on condominium conversions, and energy conservation. It also recommends students for appointments to city boards and commissions. The ASUC National Student Lobby lobbies Congress on student issues and encourages students to write their representatives. On a national level, the issues of concern have centered on student financial aid.[13]

Under university regulations and ASUC guidelines, off-campus advocacy activities are permitted only when related to student business. In the judgment of the university, the ASUC operations are university-related.

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[12]The U.C. Student Lobby is directed by the Student Body Presidents Council, a board consisting of the student body presidents of each campus. The SBPC itself has taken positions on public issues: it supported the protestors at the Diablo Canyon nuclear power plant, the nuclear freeze initiative, a boycott of Coors beer, and South African liberation movements. But no lobbying efforts were undertaken on these issues, and no funds were spent thereon.

[13]ASUC formerly supported the U.S. Student Association, a nationwide student organization which lobbies Congress on a variety of social issues. ASUC withdrew its support in 1981 because the organization was viewed as extending beyond student-related issues.

DISCUSSION

I. COLLECTION OF THE FEE

A. Authority of the University

Plaintiffs first contend that the university has no authority to impose a mandatory student activities fee. The contention is meritless.

Originally created by legislation in 1867 (Stats. 1867-1868, ch. 244, p. 248), the University of California was given constitutional footing in 1879. (Cal. Const., art. IX, § 9.) The university is declared to be "a public trust" to be administered by the Regents of the university. (Cal. Const., art. IX, § 9, subd. (a).) The Regents are vested with "the legal title and the management and disposition of the property of the university . . . ." (Cal. Const., art. IX, § 9, subd. (f).)

The courts have construed this constitutional authority as giving the Regents virtual autonomy in governing the university. "The Regents have been characterized as 'a branch of the state itself' [citation] or 'a statewide administrative agency' [citation]. It is apparent that the Regents as a constitutionally created arm of the state have virtual autonomy in self-governance (Cal. Const., art. IX, § 9)." (*Regents of University of California v. City of Santa Monica* (1978) 77 Cal.App.3d 130, 135; see also *Cal. State Employees' Assn. v. Regents of University of California* (1968) 267 Cal.App.2d 667, 671.)

The courts have viewed the Regents as having broad discretion and rule-making authority. "'"The Regents have the general rule-making power in regard to the University . . . and are . . . fully empowered with respect to the organization and government of the University. . . ." [Citations.] "[T]he power of the Regents to operate, control and administer the University is virtually exclusive. [Citations]."'" (*San Francisco Labor Council v. Regents of the University of California* (1980) 26 Cal.3d 785, 788; see also

Goldberg v. Regents of University of California (1967) 248 Cal.App.2d 867, 874.)

The Legislature has expressly authorized the creation of a student body organization and the collection of mandatory student activities fees for the state college and university system. (Ed. Code, § 89300.) The funds collected are available for "such purposes of the student body organization as are approved by the trustees." (Ed. Code, § 89302.) In addition, the funds collected are expressly allowed to be spent for lobbying activities. (Ed. Code, § 89300.) Similar statutory authority is provided for the community colleges. (Ed. Code, § 76060.5.)

No such statutory authority exists for the University of California, and none is needed, because the university is a constitutional entity whose powers derive from the Constitution and not from the Legislature. Management of the university has been removed from the Legislature and given to the Regents with "full powers of organization and government" and "all the powers necessary or convenient for the effective administration of its trust, including the power . . . to delegate to its committees or to the faculty of the university, or to others, such authority or functions as it may deem wise. . . ." (Cal. Const., art. IX, § 9, subds. (a), (f).)

The conclusion is inescapable that the university has the authority to assess mandatory student activity fees as a condition of enrollment. (See *Erzinger v. Regents of the University of California* (1982) 137 Cal.App.3d 389, 393-394, cert. den. 462 U.S. 1133 [mandatory student fee for health services].)

B. Freedom of Association

Plaintiffs next contend that insofar as the ASUC, through the ASUC Senate, has taken positions on controversial issues of the day, the university has denied plaintiffs their freedom of association by forcing them to belong and give financial support to an organization that

espouses views with which they disagree. We reject the contention.

In the context of labor relations, the United States Supreme Court has held that compulsory membership in a labor union, with the concomitant requirement to pay dues, initiation fees and assessments, does not offend the federal Constitution. *(Railway Employees' Dept. v. Hanson* (1961) 351 U.S. 225.) The *Hanson* court squarely held that "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work . . . does not violate . . . the First Amendment." (351 U.S. at p. 238.) In so holding, the court observed, "there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated state bar." (*Ibid.*)

Subsequently, in *Lathrop v. Donohue* (1961) 367 U.S. 820, the United States Supreme Court found no constitutional infirmity in the compelled membership of an attorney in an integrated bar association. The court emphasized that "[the attorney's] compulsory enrollment imposes only the duty to pay dues." (*Id.*, at pp. 827-828.) Quoting from the Wisconsin Supreme Court, the United States Supreme Court observed: "The rules and by-laws of the State Bar . . . do not compel the plaintiff to associate with anyone. He is free to attend or not attend its meetings or vote in its elections as he chooses. The only compulsion to which he has been subjected by the integration of the bar is the payment of the annual dues of $15 per year." (367 U.S. at p. 828.) Noting that the State Bar activities served to elevate "the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State," the court concluded that "[g]iven the character of the integrated bar shown on this record, in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, we are unable to find any impingement upon protected rights of association." (367 U.S. at p. 843.)

We emphasize that we do not here decide whether membership in ASUC may be compelled. (Cf. *Good v. Associated Students of University of Washington* (1975) 86 Wash.2d 94 [542 P.2d 762, 768] [membership in a student body organization may not be compelled].) Some time before trial (apparently after the small claims actions were filed), the university took the position that membership in the ASUC is voluntary. Previously, membership in the ASUC had been viewed as a mandatory concomitant of registration as a student; a student registration card signified membership in the ASUC. When this litigation began, however, the registration card was changed to add a declaration on the back of the card: "I am a registered student of the University of California. I voluntarily accept this ASUC membership." The university determined that only students who signed the back of their registration card were members of the ASUC.

Plaintiffs argue that the voluntary nature of the membership is illusory since all students are required to pay the activities fee which funds the ASUC, the university keeps no records of which students are members, and students are not required to show their ASUC "membership card" in order to participate in ASUC activities or services. (Membership in ASUC is required only to hold ASUC office or vote in ASUC elections.) The trial court considered such evidence, however, and found that ASUC membership is voluntary. On the record before us, we are bound by that finding. (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660-661.)

Yet, although membership in the ASUC is voluntary, payment of the student activity fee is not. Thus, the constitutional question remains whether plaintiffs can be compelled to provide financial support to an organization to which they do not care to belong.

In *Abood v. Detroit Board of Education* (1977) 431 U.S. 209, a group of public employees challenged a statutorily authorized agency shop whereby every employee represented by a union, even though not a member of the

union, was compelled to pay union dues. While acknowledging the infringement upon the plaintiffs' First Amendment rights from the mandatory dues, the court nonetheless held the infringement was justified by the "important governmental interests" in labor peace fostered by the use of a single, exclusive bargaining representative. (431 U.S. at pp. 222, 225.)

More recently, in *Keller v. State Bar of California, supra,* ___ U.S. ___ [110 L.Ed.2d 1], the Supreme Court reaffirmed its prior rulings. The plaintiffs in *Keller* were members of an integrated bar association, and, although no issue was raised as to whether the plaintiffs could be compelled to join and financially support the state bar association, the Supreme Court quoted with approval from the holding of *Lathrop v. Donohue, supra,* 367 U.S. 820, that the freedom of association is not impinged by compulsory payment of reasonable annual dues. (*Keller, supra,* 110 L.Ed.2d at pp. 10-11 [110 S.Ct. at pp. 2332-2233.) Further, the *Keller* court went on to say that just as employees of an agency shop must pay dues even if they choose not to join the union, so should members of the bar be compelled to pay dues. "It is entirely appropriate that all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in [the State Bar's effort to regulate the profession]." (*Id.*, at p. 13 [110 S.Ct. at p. 2235].)

Pursuant to the Supreme Court's rulings in *Hanson, Lathrop* and *Abood,* as affirmed in *Keller,* we discern two grounds for concluding that plaintiffs may be required to pay a supporting activities fee as a condition of enrollment. First, as in *Lathrop,* plaintiffs here are not obliged to associate with anyone; they are merely required to pay the activities fee. They are free to join the ASUC or not, and if they decide to join, they are free to choose whether to attend ASUC Senate meetings and free to vote for the ASUC Senator of their choice. Indeed, there is nothing to

prevent plaintiffs from seeking Senate office and making their own voices heard in the Senate debates.

Second, like the integrated bar associations in *Lathrop* and *Keller*, the student body organization serves unique and important administrative functions. It not only provides the mechanism for student self-government, it also administers student extracurricular activities, and it serves as a representative of the student body for purposes of interchange with the university hierarchy as well as communication with the outside world. Furthermore, while engaging the students in self-government and administrative activities, the ASUC contributes to the educational mission of the university. All of the students derive benefit from the work of the ASUC.

Accordingly, we conclude that all students may be compelled to help finance the ASUC operations. The compulsory financial support of the ASUC and its funded activities does not deprive plaintiffs of their rights of association.

II. USE OF THE STUDENT FEES

A. Freedom of Speech

Plaintiffs further argue that the use of student activities fees to fund student groups with political or ideological viewpoints with which they disagree constitutes a form of compulsory political expression which violates their rights of free speech. We reject the argument.

In *Abood v. Detroit Board of Education, supra,* 431 U.S. 209, the plaintiffs alleged that they were deprived of their First Amendment freedoms in that the union was engaged in various political and other ideological activities of which the plaintiffs did not approve. The court agreed that First Amendment rights are infringed when persons are compelled to make contributions to support an ideological cause they oppose (431 U.S. at pp. 233-235) and held that contributions may be compelled only for activities "germane to [the union's] duties as collective bargaining

representative." (*Id.*, at p. 235; see also *Railway Employees' Dept. v. Hanson, supra,* 351 U.S. at p. 235.) The court concluded that contributions cannot be compelled for "ideological activities unrelated to collective bargaining." (431 U.S. at p. 236.)

In *Keller v. State Bar of California, supra,* 110 L.Ed.2d 1, the Supreme Court reiterated the *Abood* test and applied it beyond the context of labor relations. The court held that the State Bar could "constitutionally fund activities germane to [its] goals [of regulating the legal profession and improving the quality of legal services] out of the mandatory dues of all members. It may not, however, in such manner fund activties of an ideological nature which fall outside of those areas of activity." (110 L.Ed.2d at p. 14.) The *Keller* court warned that "Precisely where the line falls . . . will not always be easy to discern." (*Id.*, at p. 15.)

Applying the *Abood* test here leads us to the conclusion that the activities funded by the student fees are "germane" to the university's goal of educating its students.[14] In reaching that conclusion, we are guided by four early cases which uniformly held that using mandatory student fees to support certain controversial activities serves a legitimate university purpose and is constitutionally permissible. *Good v. Associated Students of Univ. of Washington, supra,* 542 P.2d 762 [student activities]; *Arrington v. Taylor* (M.D.N.C. 1974) 380 F.Supp. 1348 [student newspaper]; *Veed v. Schwartzkopf* (D.Neb. 1973) 353 F.Supp.

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[14]The Education Code defines the university's mission as providing undergraduate, graduate and professional instruction and conducting academic research. (Former Ed. Code, § 66500, now § 66010.4, subd. (c).)

We are mindful that the *Keller* court rejected the California Supreme Court's definition of the State Bar's purposes ("'to aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice'"), even though such are the purposes set out in the Business and Professions Code, and fashioned its own definition ("regulating the legal profession or improving the quality of . . . legal services"). (110 L.Ed.2d at pp. 14-15.) We nevertheless state with confidence that the university's purpose is to educate.

149, affd. 478 F.2d 1407, cert. den. 414 U.S. 1135 [student newspaper and student-run speakers' program]; *Larson v. Board of Regents of University of Neb.* (1973) 189 Neb. 688 [204 N.W.2d 568] [same].)

Although the analytical approaches taken in each of these four cases were slightly different, all four reached the same result. All four, of course, predated *Abood* and *Keller* but the conclusions reached in those cases remain sound. The test under *Abood* and *Keller* is whether the mandatory fees are used for activities related to the organization's purposes. In each of the precedent student fee cases, the court regarded the activity as educational—one which supplements classroom education by exposing the students to divergent views. As one court put it: "Perhaps [the newspaper's] most important function is to complement classroom education by exposing the student body to various points of view on significant issues, and to allow students to express themselves on those issues." (*Arrington v. Taylor, supra,* 380 F.Supp. at pp. 1362-1363.)

Plaintiffs rely primarily on a single case: *Galda v. Rutgers* (3rd Cir. 1985) 772 F.2d 1060, cert. den. 475 U.S. 1065. In that case, former students of Rutgers University successfully challenged the imposition and use of a separate student fee to support the New Jersey Public Interest Research Group (PIRG), an independent corporation engaged in research, lobbying and advocacy for social change. However, the court took great care to distinguish the case before it from cases involving the funding of student activities by a mandatory activities fee. The court noted that unlike the student programs upheld in *Veed* and *Arrington*, "PIRG does not provide a forum for the expression of differing views" (772 F.2d at p. 1064), but rather presents only one point of view, and the student fee supports only that group.[15]

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[15]At UC, a similar organization, the California Public Interest Research Group, is funded by voluntary fees.

The *Galda* case, then, is entirely consistent with the other cases upholding a mandatory student activity fee. The *Galda* court observed that the creation of a forum for expression of diverse views may be a compelling justification for the slight infringement on First Amendment rights, "just as is the need for labor peace in the union dues cases." (772 F.2d at p. 1067.) Clearly, the *Galda* court viewed the funding of various campus organizations as related to the university's educational purpose so long as all student groups are eligible to share in the student activity fund.

We, too, conclude that the funding of the various student groups is related to the university's educational purpose. The funding of the student groups provides a forum for the exchange of ideas and the advocacy of a variety of ideological causes. Furthermore, the funding of student groups does not enhance a single ideological point of view. On the contrary, the philosophies of the various groups are diverse, and funding is available to any group no matter what its ideological bent. No evidence was presented that any group had been denied funding on the basis of ideology.[16] The trial court expressly found that any group of four students expressing any viewpoint was free to register with the university and become eligible for funding.

Despite our application of the *Abood* test, we emphasize the unique context presented here—a university setting. We find persuasive the reasoning in *Kania v. Fordham* (4th Cir. 1983) 702 F.2d 475, in which the Court of Appeals distinguished *Abood* on this basis. In *Kania*, a group of students at the University of North Carolina relied upon *Abood* to challenge the use of mandatory student fees to fund a student newspaper which advocated views with

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[16]On appeal, plaintiffs have suggested that ASUC funding is less than evenhanded because most of the funded groups have "leftist" leanings. But plaintiffs presented no evidence at trial to support a claim of discriminatory treatment.

which they disagreed. In concluding that no constitutional violation occurred, the court emphasized two points of contrast with *Abood*. First, the court noted the "special nature" of a public university: "[T]he campus of a public university, at least for its students, possesses many of the characteristics of a public forum. 'The college classroom with its surrounding environs is peculiarly "the marketplace of ideas."' . . . [Citation.]" (702 F.2d at p. 479, fn. 7.) Second, the court emphasized the evenhandedness of the communications funded by the student fees: "In *Abood* . . . the Union's communications . . . were one-sided presentations of the 'Union's viewpoint.' The mandatory fees in *Abood* therefore, enhanced the power of one, and only one, ideological group to further its political goals. In contrast, [the student newspaper] increases the overall exchange of information, ideas, and opinions on the campus." (702 F.2d at pp. 479-480.)

These distinctions cannot be overlooked. Given the nature of the university, the *Kania* court found it appropriate to give deference to the university's judgment: "The University's academic judgment is that the paper is a vital part of the University's educational mission, and that financing it is germane to the University's duties as an educational institution." (*Kania v. Fordham, supra,* 702 F.2d at pp. 479-480.) A similar approach was taken in *Veed v. Schwartzkopf, supra,* 353 F.Supp. 149, where the court gave recognition to the university's broad powers to define its educational task. "Within wide limitations a state is free to adopt such educational philosophy as it chooses. The Board of Regents of the University of Nebraska obviously has embraced an educational philosophy that the education of students extends beyond that which takes place in the classroom under the tutelage of instructors and professors. The practices of the Board of Regents indicate that it considers as relevant to the educational process extracurricular opportunities for students to be exposed to speakers outside the classroom who may express widely divergent opinions on a number of topics. It clearly has

concluded to adopt as a part of the educational process the publication and distribution of a student newspaper.

". . . . . .

"Our states, through their colleges and universities, must retain the freedom and flexibility to put before their students a broad range of ideas in a variety of contexts. The wisdom or political desirability of the specific route chosen is not a question to be determined by the courts." (*Id.*, at pp. 152, 153.)

We employ the same analysis here. The very nature of university education presupposes free expression of divergent views. "When a student enrolls at a university he or she enters an academic community—a world which allows the teaching, advocacy and dissemination of an infinite range of ideas, theories and beliefs. They may be controversial or traditional, radical or conformist. But the university is the arena in which accepted, discounted—even repugnant—beliefs, opinions and ideas challenge each other." (*Good v. Associated Students of Univ. of Washington, supra,* 542 P.2d at pp. 768-769.) In this tradition, the Regents have obviously decided that the educational process extends beyond the classroom and includes extracurricular opportunities for students to be exposed to widely divergent opinions on various topics. The Regents have implicitly concluded that the use of student fees to finance student activities, including student groups that advocate positions on political and ideological matters, is necessary and related to the university's educational purposes. The broad powers granted the university for the governance of its affairs (Part 1(A), *ante*) gives the Regents wide discretion to determine the best course for the university's educational mission. We must defer to that decision. (*San Francisco Labor Council v. Regents of University of California, supra,* 26 Cal.3d at p. 788.)

Plaintiffs emphasize that through its lobbying activities the ASUC has engaged in not just educational but also "political" activities. The *Abood* court, however,

rejected the notion that attaching the adjective "political" to an activity is determinative. The court recognized that by its very nature a public employees' union is involved in political activities to secure approval of public authorities and to obtain needed budgetary and appropriations decisions. (431 U.S. at p. 236.) The court declined to define the dividing line between permissible and impermissible political activities, but held that contributions may be compelled for "ideological activities" as long as they are related to the organization's purposes. (*Ibid.*) Similarly, the *Keller* court found no constitutional infirmity in lobbying activities per se, but only in "those activities having political or ideological coloration which are not reasonably related to the advancement of [the State Bar's] goals." (110 L.Ed.2d at p. 15; see also *Lathrop v. Donohue, supra,* 367 U.S. at pp. 833-834, 843.)

The test, then, is not whether the activity is political but whether the political activity is related to the organization's purposes. Here, the record supports the trial court's finding that lobbying activities are confined to student and university issues. Accordingly, they are related to the university's function, and no constitutional infringement occurred.

B. Establishment of Religion

Plaintiffs next contend that the use of the mandatory activities fee to fund certain student religious groups violates the Establishment Clause. (U.S. Const., Amend. I; Cal. Const., art. I § 4; art. XVI, § 5.) The contention is unsupported by the record.

The trial court made a factual finding that the funded student activities groups with religious names are cultural and not "religious." This finding is fully sustained by the record. Groups whose activities are essentially religious, i.e., proselytizing converts by preaching church doctrine or restricting membership to persons sharing their particular faith, are not funded. Although some religious groups were *registered* groups and thus were allowed to set

up tables at Sproul Plaza,[17] the groups that actually received ASUC funds were cultural and not religious.

III. OTHER OBJECTIONS

Plaintiffs have claimed a variety of other alleged infirmities in the collection and expenditure of the student activities fees. None of them has merit; each need only be discussed briefly.

A. Express Authority

First, relying on the principle that public funds may not be used to support political causes, campaigns or activities unless the power to do so has been given "in clear and unmistakable language" (*Stanson v. Mott* (1976) 17 Ca1.3d 206, 213-220; *Mines v. Del Valle* (1927) 201 Cal. 273, 287), plaintiffs assert that the use of student fees to fund ASUC and its activities has never been expressly authorized. The assertion is unsound.

In 1933, the Regents adopted a policy authorizing the levy and collection of a mandatory student fee "whenever requested to do so by a two-thirds vote of the student body concerned." In February 1955, a student vote was taken during registration, and 68% percent of the votes cast were in favor of a compulsory student activities fee.[18] The Regents thereupon approved the collection of such fee and its use for ASUC activities.

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[17]Once the university makes its facilities available to some groups, it must make them available to all, even religious groups. (*Widmar v. Vincent* (1981) 454 U.S. 263).

[18]Plaintiffs argued below that the votes cast in 1955 were incorrectly counted, but the trial court found plaintiffs barred by the doctrine of laches. That determination is sustained by the record, and no injustice is shown. (*Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 624.)

B. Fiscal Supervision

Plaintiffs contend the university has delegated too much authority to ASUC for expenditure of its funds. Plaintiffs emphasize that when the Regents authorized the collection of compulsory student body fees in 1933, the Regents intended to retain control over the management of the ASUC funds.

The record establishes, however, that the Regents do retain fiscal control over the ASUC and its activities. Among the constitutional powers granted the Regents in administering the university is the power "to delegate to its committees or to the faculty of the university, or to others, such authority or functions as [the Regents] may deem wise. . . ." (Cal. Const., art. IX, § 9, subd. (f).) The Regents have delegated to the chancellors of the several campuses the duty of administration of student government and student activities.

Under the university's written policies, the chancellors are empowered to "make audits of the finances of student governments, exercise control over expenditures of their funds when and to the extent necessary to maintain financial solvency of student governments, and where necessary may take action to ensure that any activity under control of student governments is operated in accordance with sound business practices consonant with University policies and procedures applicable to such practices."

Each spring, in advance of the next academic year, the ASUC budget is reviewed and approved by the Office of the Chancellor. Each fiscal year, the ASUC is audited by an independent auditing firm, and the report is sent to the university. Moreover, all ASUC Senate meetings are attended and monitored by university representatives. After each meeting, written reports are sent to the chancellor's delegate, the vice-chancellor of student services.

In sum, the Regents have not abdicated their authority, but continue to retain and exercise ultimate

supervisory control over student government and student extracurricular activities.

C. Check or Warrant

Plaintiffs challenge the method of transferring funds (the student activities fees) from the university to the ASUC by check drawn upon the revolving account of UC Berkeley payable to the ASUC's separate bank account. Relying on language contained in section 21 of the legislation of 1868 which created the university—what is referred to as the organic act—plaintiffs contend the transfer must be by warrant drawn on the treasurer of the university.[19] The claim is nonsensical.

The organic act was superseded by the 1879 constitutional amendment, which expressly provided that "organization and government [of the university] shall be perpetually continued in the form and character prescribed by the organic act creating the same . . . ." (Cal. Const., art. IX, § 9.) In 1918, the Constitution was amended to delete the reference to the organic act and instead to invest the Regents with "full powers of organization and government . . . ." There are no longer any restrictions on the manner of disbursement of university funds. The requirement that funds be transferred by warrant has been eliminated.

D. Competitive Bidding

Plaintiffs further argue that the disbursement by the university to the ASUC of the collected student activity fees (over $600,000 per year) violates the competitive bidding laws. This argument, too, borders on the frivolous.

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[19]Section 21 provides in pertinent part: "For the current expenditures of the University, specific sums of money shall be set aside . . . and shall be subject to the warrants of the President of the Board drawn upon the Treasurer of the University . . . ." (Gen. Law No. 8868; Stats. 1867-1868, ch. 244, § 21, p. 257.)

The Regents are subject to such competitive bidding procedures as made applicable by statute "for the letting of construction contracts, sales of real property, and purchasing of materials, goods, and services." (Cal. Const., art. IX, § 9, subd. (a).) The Legislature has required the Regents to undertake competitive bidding for all contracts for goods and services exceeding $50,000 annually. (Pub. Contract Code, § 10507.) But this statute is obviously directed to contracts between the university and outside suppliers. It does not apply to the internal administration of student government.

In any event, the ASUC is unique in that it is the one and only group that can create and operate a student government. Accordingly, the competitive bidding law does not apply. (Pub. Contract Code, § 10508.)

E. Support of Private Schools

The California Constitution prohibits the use of public funds to support private schools. "No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools . . . ." (Cal. Const., art. IX, § 8.)

Plaintiffs have constructed an obscure argument that the use of the student activity fees violates this provision. Yet, the constitutional prohibition is a limitation on the power of the Legislature to appropriate money; it has no application to the Regents. Furthermore, neither the ASUC nor any of its funded student activities is a "school."[20]

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[20]For the first time on appeal, plaintiffs challenge the $1.50 portion of the $12.50 mandatory fee earmarked for Ethnic Studies. Their failure to raise this objection below forecloses review, and we decline to consider it now. (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1.)

F. Political Neutrality of the University

The California Constitution guarantees the political neutrality of the university. "The University shall be entirely independent of all political or sectarian influence and kept free therefrom in the appointment of its regents and in the administration of its affairs. . . ." (Cal. Const., art. IX, § 9, subd. (f).) Plaintiffs contend that because payment of the $12.50 activity fee is a mandatory condition for enrollment of students and because the ASUC takes positions on political questions and funds political and religious groups, the students are being subject to a "sectarian, political or partisan test" for admission in violation of the university's political neutrality.[21]

The contention is meritless. As we have previously discussed, only payment of the fee is mandatory; participation in ASUC activities is not. Nor are the students compelled to espouse any particular political or religious viewpoint as a condition for enrollment. Any positions taken by the ASUC or by student groups on matters of public concern are those of the student government or the student groups and not those of the university. The student fees do not violate the university's political neutrality.

The judgment is affirmed.

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[21]Plaintiffs seem to rely primarily upon section 13 of the organic act, which provided in pertinent part: "[N]o sectarian, political or partisan test shall ever be allowed or exercised in the appointment of Regents, or in the election of professors, teachers, or other officers of the University, or in the admission of students thereto, or for any purpose whatsoever. . . ." (Stats. 1867-68, ch. 244, § 13, p. 254.) As previously noted, however, although the organic act was incorporated in the 1879 version of article IX, section 9 of the Constitution, in the 1918 amendment the reference to the organic act was deleted.

Dossee, J.

We concur:

Strankman, P. J.

Newsom, J.

CERTIFIED FOR PUBLICATION

Smith v. Regents, A020553

No. 1/1 A020553 - S006588

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

AVERELL SMITH et al.,
Appellants

v.

REGENTS ON THE UNIVERSITY OF CALIFORNIA et al.,
Respondents

The above entitled cause is transferred to the Court of Appeal, First Appellate District, Division One, with directions to vacate its decision and to reconsider the matter in light of Keller v. State Bar of California (1990) __U.S.__ [110 S.Ct. 2228.]

LUCAS
Chief Justice

BROUSSARD
Associate Justice

PANELLI
Associate Justice

KENNARD
Associate Justice

ARABIAN
Associate Justice

BAXTER
Associate Justice

Associate Justice

FILED
JUN 14, 1988

Court of Appeal - First App. Dist.
RON D. BARROW
By_____
Deputy

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

AVERELL SMITH et al.,

Plaintiffs and Appellants,

v.

THE REGENTS OF THE
UNIVERSITY OF CALIFORNIA
et al.,

Defendants and Respondents.
_____/

A020553
(Alameda County
Super. Ct.
Nos. 519977-2,
533997-6)

This action challenges the collection and use of a mandatory student activities fee by the University of California, Berkeley, to fund certain activities of the student body organization, the Associated Students of the University of California (ASUC).

STATEMENT OF THE CASE

In 1979, four plaintiffs filed suit in superior court for declaratory and injunctive relief against the university and ASUC seeking to have the mandatory activities fee imposed upon all students who attend the University of California at Berkeley declared unconstitutional and in violation of statute. (*Smith v. Regents*, No. 519977-2.)

In 1980, 32 students from UC Berkeley sued ASUC in small claims court seeking a refund of the activities fee. In response, ASUC filed suit in superior court to enjoin the small claims actions. (*ASUC v. Sparks*, No. 533997-6.)

The Smith case and Sparks case were eventually consolidated. In 1982, the trial court granted a partial summary adjudication in favor of defendants UC and ASUC.[1] The court concluded that "the mandatory student activities fee imposed on all students at the University of California, Berkeley, is constitutional and legal on its face and as applied."

This order was interpreted by the parties as resolving issues of imposition and collection of the fees. However, issues relating to the expenditure and use of those fees were left unresolved. Those issues were tried by the court sitting without a jury. The trial court ultimately determined that the use of the fee to provide financial support for the ASUC activities was not invalid. Plaintiffs have appealed from the judgment entered in favor of defendants UC and ASUC.

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[1]For the sake of convenience, the students will be referred to as "plaintiffs" and the university and ASUC as "defendants" unless otherwise shown.

FACTS

Viewing the record in a light favorable to respondents (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925-926), we glean the following salient facts.

Since 1955, all students enrolling at the University of California, Berkeley, have been required to pay a student activities fee as a condition of enrollment. At the time of the trial (1982), the fee was $12.50 per quarter. Of that amount, the university retains $4 applied towards redemption of the bonds issued to finance construction of the Student Union building on the Berkeley campus. The remaining amount is transferred to the ASUC for allocation of $1.50 to support the Ethnic Studies Program and $7 to finance the student government and student activities.

Since the early 1900's, the ASUC has been officially recognized by the university as the entity responsible for administration and management of student government and student activities on the Berkeley campus. The ASUC, a nonprofit unincorporated association, has a full-time staff of approximately 85-90 persons and a part-time staff of 250-400 persons, most of whom are students.

In addition, the ASUC also owns and operates a campus bookstore and a ski lodge at Norden, California; it also manages the Student Union building and Eshelman Hall. The revenues derived from these business enterprises supplement the allotted student body fees.[2]

ASUC OPERATIONS

1. Student Government

The ASUC operates student government through the ASUC Senate, a legislative (policy-making) body

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[2]Thus, in 1981-1982, for example, the total amount spent by ASUC to support student government, student activities groups and student operations was $1,016,505. Of that total, $607,635 was collected from the quarterly student body fee and the remainder from other revenues.

composed of 30 elected student representatives. An adjunct body, the Graduate Assembly (representing graduate students), consists of representatives elected by the various graduate departments. Two delegates from the Graduate Assembly are members of the ASUC Senate.

The ASUC Senate meets weekly during the academic school year. Occasionally, controversial public issues are presented to the Senate for debate and a resolution adopted expressing the "position of the ASUC." By way of example, during the several years preceding trial, the ASUC Senate adopted resolutions expressing ASUC's support of Amnesty International's campaign against political prisoners in Indonesia, gay and lesbian rights, the ERA, gun control, the reelection of Ron Dellums, and a Berkeley marijuana initiative. It has also adopted resolutions opposing torture in Uruguay, nuclear power and draft registration.[3]

University officials have consistently viewed ASUC Senate resolutions dealing with matters of public concern as compatible with university rules or regulations. The university's written policies declare, in pertinent part: "Student governments shall have the right to address and take positions on public issues. Positions on issues taken by student governments shall not be represented as or deemed to be official positions of the University. Compulsory student fees shall not be expended in support of such positions except for University-related purposes." Thus, the direct use of student fees to support a particular cause is expressly prohibited. Resolutions on public issues adopted by the ASUC Senate do not, however, involve the expenditure of funds and do not purport to represent the position of the university.

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[3]Parenthetically, we note that the ASUC also has adopted a policy of "social responsibility" in connection with the operation of its commercial facilities. Consequently, it will not do business with companies that invest in South Africa, and it supports boycotts of Coors Beer, Nestle's products and Dole produce.

2. Student Activities Groups

The ASUC provides funding to approximately 150 student activities groups. These student activities groups run the gamut from yell leaders to bicycle enthusiasts to Polish folk dancers. Many of the groups advocate positions on political and ideological matters.[4]

The activities of the groups are confined to the campus, generally consisting of efforts to educate fellow students about current issues and to promote debate. Their views are expressed through printing and/or distributing literature, staffing tables at Sproul Plaza, holding rallies or forums with one or more speakers, showing films and the like. Some groups urge overt political action: they circulate petitions and encourage students to send letters or postcards to various government officials. But none of the student groups purport to express the position of the university or of the ASUC.

In order to obtain ASUC funding or use of university facilities, a student group (consisting of at least four students) must first register with the university. Registration is accomplished by submitting a copy of its constitution and the name of its student representative. In this manner, the university ensures that group members are students in good standing and that the group complies with university rules and regulations.[5]

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[4]For example, Amnesty International; Berkeley Students for Peace; Campus N.O.W.; Campus Abortion Rights Action League; Conservation and Natural Resources Study Student Organization; East Bay Right to Life; Gay and Lesbian Union; Greenpeace Berkeley; Iranian Students Association; Progressive Students Organization; Radical Education and Action Project; Sparticus Youth League; Students Against Intervention in El Salvador; Students for Economic Democracy; UC Berkeley Feminist Alliance and Women Organized Against Sexual Harassment; UC Campus Sierra Club.

[5]One group, for example, the Revolutionary Communist Youth Brigade, was denied registration as a student group due to its disruptive behavior in classes.

Once registered, any student group desiring funding must submit an application to the ASUC Finance Committee identifying its membership and membership requirements, its goals and a line/item request for expenditures. The ASUC Finance Committee (comprised entirely of students) reviews each application in accordance with written ASUC guidelines in determining whether to approve the funding application. The written guidelines provide, inter alia, that: "The requested funds shall be used for purposes or programs related to the University or beneficial to the student body of the University of California [and ¶] shall not be used for purposes or programs connected with partisan political activities or any ballot measure with the exception of nonpartisan educational forums on issues of interest."

Accordingly, student groups supporting partisan political activities (e.g., the Young Republicans or the Young Democrats) are ineligible for funding. And while religious proselytizing groups are similarly ineligible, student activities groups employing religious names may qualify if the funds are used for cultural and educational activities and not for the expression or practice of a religion.[6]

The Finance Committee recommendations are considered by the full ASUC Senate as a part of the annual ASUC budget.

Funding of student activities groups is content neutral. There is no evidence that funding was approved or denied on the basis of a group's position on a particular

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[6]Included within the former classification are groups such as the Jewish Student Board, the Hindu Students Association and the Moslem Students Society.

issue.[7] With the exceptions noted, any group is eligible for funding irrespective of its political or ideological orientation.

Student activity groups are only funded on a reimbursement basis. That is, each group must submit an expense voucher for reimbursement or direct payment to a supplier. Payment is made only if the expense is consistent with the line/item budget approved by the ASUC Senate.[8] None of the funds is transferred directly to student groups; nor are such student groups permitted to maintain separate bank accounts.[9]

Finally, all student groups are required to file with ASUC mid-year reports of their activities. The failure to file such reports or any violation of university or ASUC rule or regulation subjects that group to suspension of any unused funds.

The record convincingly demonstrates that none of the student activities groups supported by ASUC violate university or ASUC rules or regulations. In the judgment

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[7]However, funding would not be approved if membership requirements were found to be discriminatory. The ASUC guidelines provide that the organization must be "open to all duly registered students of the University of California and [the organization's documents] shall contain no provision limiting membership to any specific group or class or persons or otherwise discriminating against any student on the basis of race, creed, religion, ethnicity, sex, or sexual persuasion."

[8]Line/item expenses eligible for funding are personal services; stationery and supplies; telephone; travel; dues and subscriptions; postage; equipment rental; advertising; programs and printing; facilities rental; and other related expenses.

[9]In addition to monetary funding, the ASUC provides office space to some student groups. Eshelman Hall is dedicated to ASUC functions. The fifth and sixth floors contain offices available for use by student groups. Normally, three groups will share a single office.

Although university guidelines prohibit the use of university facilities "for organizing and maintaining personal political activities," university officials do not consider the use of Eshelman Hall offices as being within this prohibition.

of university officials, the funding of these groups creates a forum for the exchange of ideas and serves an important educational purpose.

3. Other ASUC Operations

In addition to funding student activity groups, the ASUC sponsors certain student-run operations, usually managed by a professional staff. Because student operations are part of ASUC, funding for these operations is handled differently. Budget requests are routed through the executive director and Operations Committee of the ASUC, who, in turn, make recommendations to the ASUC Senate.

These ASUC student operations serve to provide information to the student body and to represent the students' views to the community. The activities and policies of these student operations are monitored by ASUC Senate oversight committees.

At the time of trial, funded ASUC student operations included the following:

1) a draft counseling center;

2) a recycling project;

3) a renters' assistance project: this project presents the student viewpoint at local agencies, e.g., the Berkeley Rent Stabilization Board concerning proposed rent increases; it also assists students in small claims actions and provides information to them about their rights as tenants;

4) an academic affairs office representing the student viewpoint in its workings with the Academic Faculty Senate;

5) a campus affairs office which works with the university and participates in university planning, e.g., advocating student housing, lobbying the university not to curtail basic student services in budget reductions; and

6) a voter registration project consisting of mailing informational brochures on ballot issues to students and urging them to register to vote.[10]

ASUC also funds certain student lobbying organizations: the U.C. Student Lobby works in concert with representatives of other UC campuses on student-related issues before the State Legislature and state administrative agencies.[11] By way of illustration of its lobbying activities, the U.C. Student Lobby opposed legislation prohibiting the use of registration fees to fund abortions, supported legislation prohibiting rent discrimination against students, opposed legislation prohibiting mandatory student fees for student activities, and supported legislation reducing budget cuts for the university.[12] The Berkeley Annex of the U.C. Student Lobby acts on campus to publicize the positions taken by the U.C. Student Lobby and to encourage students to write their legislators.

The Municipal Lobby lobbies Berkeley city agencies on issues relating to students, especially those related to housing, rent control, restrictions on condominium conversions and energy conservation. It also recommends students for appointments to city boards and commissions.

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[10]One brochure gave a telephone number to call "for assistance." The number was that of Congressman Dellums's office.

[11]The student body organizations for the state university system and state community colleges also maintain similar lobbies in Sacramento supported by student activities fees.

[12]The U.C. Student Lobby is directed by the Student Body Presidents Council (SBPC), a board consisting of the student body presidents of each campus. The SBPC itself has taken positions on a variety of controversial issues: it supported the protest of the Diablo Canyon nuclear power plant, the nuclear freeze initiative, a boycott of Coors Beer and South African liberation movements. However, no lobbying efforts were undertaken on these issues, and no funds were expended directly or otherwise.

The ASUC National Student Lobby lobbies Congress on student issues and encourages students to write their representatives. The issues of concern at the national level have centered on student financial aid.[13]

Under university regulations and ASUC guidelines, off-campus advocacy activities are permitted only when related to student affairs or business. In that context, the university has consistently viewed ASUC operations as being *university related*.[14]

DISCUSSION

I. Collection of the Fee

A. Authority of the University

Plaintiffs first contend the university has no legal authority to impose a mandatory student activities fee. The contention is meritless.

Although originally created by legislation in 1867 (Stats. 1867-1868, ch. 244, p. 248), in 1879, the University of California was given independent constitutional footing. (Cal. Const., art. IX, § 9.) The university is constituted as "a public trust" to be administered by the Regents of the university "with full powers of organization and government . . . ." (Cal. Const., art. IX, § 9, subd. (a).) The Regents are vested with "the legal title and the management and disposition of the property of the university . . ." and given "all the powers necessary or convenient for the effective administration of its trust, including the power . . . to delegate to its committees or to the faculty of the university, or to others, such authority or

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[13]ASUC formerly supported the U.S. Student Association, a nationwide student organization which lobbies Congress on a variety of social issues. In 1981, ASUC withdrew its support because the organization was viewed as exceeding the scope of student-related issues.

[14]Thus, for example, rent control lobbying for student housing is considered to be a university-related issue.

functions as it may deem wise. . . ." (Cal. Const., art. IX, § 9, subd. (f).)

This constitutional authority has been construed as giving the Regents virtual autonomy in governing the university. "The Regents have been characterized as 'a branch of the state itself' [citation] or 'a statewide administrative agency' [citation]. It is apparent that the Regents as a constitutionally created arm of the state have virtual autonomy in self-governance (Cal. Const., art. IX, § 9)." (*Regents of University of California v. City of Santa Monica* (1978) 77 Cal.App.3d 130, 135; see also *Cal. State Employees' Assn. v. Regents of University of California* (1968) 267 Cal.App.2d 667, 671.)

The courts have viewed the Regents as having broad discretion and rule-making authority. ""The Regents have the general rule-making power in regard to the University . . . and are . . . fully empowered with respect to the organization and government of the University. . . ." [Citations.] "[T]he power of the Regents to operate, control, and administer the University is virtually exclusive. [Citations.]"" (*San Francisco Labor Council v. Regents of University of California* (1980) 26 Cal.3d 785, 788; see also *Goldberg v. Regents of the University of California* (1967) 248 Cal.App.2d 867, 874.)

The Legislature has expressly authorized the creation of a student body organization and the collection of mandatory student activities fees for the state college and university system. (Ed. Code, § 89300.) The funds collected are available for "such purposes of the student body organization as are approved by the trustees." (Ed. Code, § 89302.) In addition, the funds collected are expressly allowed to be spent for lobbying activities. (Ed. Code, § 89300.) Similar statutory authority is provided for the community colleges. (Ed. Code, § 76060.5.)

No such statutory authority exists for the University of California, and none is needed since the university is a constitutional entity whose powers derive

from the Constitution and not from the Legislature. Control over the university has been removed from the Legislature and given to the Regents with "full powers of organization and government" and "all the powers necessary or convenient for the effective administration of [their] trust . . . ." (Cal. Const., art. IX, § 9, subds. (a), (f).)

Thus, the conclusion is inescapable that the university has the authority to assess a mandatory student activities fee as a condition of enrollment. (See *Erzinger v. Regents of University of California* (1982) 137 Cal.App.3d 389, 393-394, cert. den. 462 U.S. 1133 [student fee for health services].)

B. Freedom of Association

Plaintiffs next contend that insofar as ASUC has taken positions on controversial issues of the day, the university has denied plaintiffs their freedom of association by forcing them to belong, and give financial support, to an organization which espouses views with which they disagree. The contention must be rejected.

In the context of labor relations, the United States Supreme Court has held that compulsory membership in a labor union, with the concomitant requirement to pay dues, initiation fees and assessments, does not offend the federal Constitution. (*Railway Employes' Dent. v. Hanson* (1956) 351 U.S. 225.) The *Hanson* court squarely held that "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work . . . does not violate . . . the First [Amendment]." (351 U.S. at p. 238.) In so holding, the court observed, "there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar." (*Ibid.*)

Subsequently, in *Lathrop v. Donohue* (1961) 367 U.S. 820, the United States Supreme Court found no constitutional infirmity in the involuntary membership of an

attorney in an integrated bar association. The court emphasized that "[the attorney's] compulsory enrollment imposes only the duty to pay dues." (*Id.*, at pp. 827-828.) Quoting from the Wisconsin Supreme Court, the United States Supreme Court observed: "'The rules and by-laws of the State Bar . . . do not compel the plaintiff to associate with anyone. He is free to attend or not attend its meetings or vote in its elections as he chooses. The only compulsion to which he has been subjected by the integration of the bar is the payment of the annual dues of $15 per year.'" (367 U.S. at p. 828.) Noting that the state bar activities served to elevate "the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State," the court concluded that "[g]iven the character of the integrated bar shown on this record, in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, we are unable to find any impingement upon protected rights of association." (367 U.S. at p. 843.)

More recently, in *Abood v. Detroit Board of Education* (1977) 431 U.S. 209, a group of public employees challenged a statutorily authorized agency shop whereby every employee represented by a union, even though not a union member, was compelled to pay union dues. While acknowledging the infringement upon the plaintiffs' First Amendment rights by reason of the mandatory dues, the court nonetheless held that the infringement was justified by the "important governmental interests" in labor peace fostered by the use of a single, exclusive bargaining representative. (431 U.S. at pp. 222, 225.)

Outside the context of labor relations, the Washington State Supreme Court has held that *membership* in a student body organization may not be compelled, but a student activities *fee* could be required of all students and could be used to support the student body organization even though it took positions to which some students objected. (*Good v. Associated Students of Univ. of Washington* (1975) 86 Wash.2d 94 [542 P.2d 762, 768].)

We do not here decide whether *membership* in ASUC may be compelled. Some time before trial (apparently after the small claims actions were filed), the university adopted the official position that membership in the ASUC is purely voluntary. Previously, membership in the ASUC had been viewed as a mandatory requirement of registration as a student. And the student registration card signified membership in the ASUC. When this litigation began, however, the registration card was changed with the following declaration appearing on the back of the card: "I am a registered student of the University of California. I voluntarily accept this ASUC membership." The university determined that only those students who signed the back of their registration cards were members of the ASUC.

Plaintiffs argue that the voluntary nature of the membership is illusory since all students are required to pay the activities fee, the university keeps no records of which students are members, and students are not required to display their ASUC "membership card" in order to participate in ASUC activities or services. (ASUC membership is required only to hold ASUC office or to vote in ASUC elections.)

The trial court considered such evidence, however, and found that ASUC membership is voluntary. We are, of course, bound by that finding. (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660-661.)

But although membership in the ASUC is voluntary, payment of the student activity fee is not. Thus, the constitutional question remains whether plaintiffs can be compelled to provide financial support to an organization to which they elect not to belong. Pursuant to the *Hanson/Lathrop/Abood* trilogy, we conclude that plaintiffs can properly be required to pay a supporting activities fee.

As in *Lathrop*, plaintiffs here are not obliged to associate with anyone; they are merely required to pay the activities fees. They are free to decide whether to attend ASUC Senate meetings and free to vote for the ASUC

Senator of their choice. Indeed, there is nothing to prevent plaintiffs from seeking senate office and making their own voices heard in senate debates.

Moreover, like the labor unions in *Hanson* and *Abood*, the student body organization serves unique and important functions in the educational mission of the university. Not only does it provide an effective mechanism to administer self-government and extracurricular student activities, but it also serves as a representative of the student body for purposes of communication and interchange with the university hierarchy.

We think that, much like the need for labor relations tranquility, the importance of student government sufficiently justifies any actual interference with plaintiffs' rights of association. Accordingly, we conclude that the compelled financial support of ASUC and its funded activities is constitutionally permissible.

II. Use of the Student Fees

A. Freedom of Speech

Plaintiffs further argue that the use of student activities fees to fund student groups with political or ideological viewpoints with which they disagree constitutes a form of compulsory political expression in violation of their rights of free speech. The argument is not convincing.

In *Machinists v. Street* (1961) 367 U.S, 740, the plaintiffs in a union shop were required to join the union and pay dues. Part of the dues was used to finance election campaigns of various candidates whom plaintiffs opposed and to promote political and economic doctrines with which they disagreed. The court avoided the constitutional questions, however, by deciding that the federal Railway Labor Act authorizing a union shop contemplated only expenditures related to collective bargaining and that the use of compulsory union dues to support candidates for

public office and to advance a political agenda violated that act. (367 U.S. at p. 768.)

More recently, in *Abood v. Detroit Board of Education*, 431 U.S. 209, the court reached the constitutional questions bypassed in *Street*. In *Abood*, the plaintiffs alleged that the union was engaged in various political and other ideological activities disapproved by plaintiffs and thus deprived them of their First Amendment rights of freedom of association. The court agreed that First Amendment rights are infringed when persons are compelled to make contributions to support an ideological cause they oppose (431 U.S. at pp. 233-235) but reiterated that contributions may be compelled limited to activities "germane to [the union's] duties as collective bargaining representative." (*Id.* at p. 235; see also *Railway Employes' Dept. v. Hanson, supra*, 351 U.S. at p. 235.) The court concluded that contributions cannot be compelled for "ideological activities unrelated to collective bargaining." (431 U.S. at p. 236.)

The courts have uniformly held that the use of mandatory student fees to support certain controversial student activities is constitutionally permissible. (*Good v. Associated Students of Univ. of Washington, supra*, 542 P.2d 762 [student activities]; *Arrington v. Taylor* (M.D.N.C. 1974) 380 F.Supp. 1348 [student newspaper]; *Veed v. Schwartzkopf* (D.Neb. 1973) 353 F.Supp. 149, cert. den. 414 U.S. 1135 [student newspaper and student-run speakers' program]; *Larson v. Board of Regents of University of Neb.* (1973) 189 Neb. 688 [204 N.W.2d 568] [same].) In each case, the court regarded the activity as one which supplements classroom education by exposing the students to a variety of views on significant issues.

Although the analytical approach taken in each of the four cases decided before *Abood* is slightly different, all of them reached the same cognizable result. The relevant test under *Abood* is whether the mandatory fees are used for activities "related" or "germane" to the organization's purposes. In each of the precedent cases, the courts viewed

the creation of a forum for the exchange of diverse ideas as part and parcel of the university's educational function.

Plaintiffs rely primarily on a single case: *Galda v. Rutgers* (1985) 772 F.2d 1060, cert. den. 475 U.S. 1065. In that case, former students of Rutgers University successfully challenged the mandatory imposition and use of a separate student fee to support the New Jersey Public Interest Research Group (PIRG), an independent corporation engaged in research, lobbying and advocacy for social change.

However, the court took great care to distinguish the case before it from those involving the funding of student activities by a mandatory activities fee. The court noted that unlike the student programs upheld in *Veed* and *Arrington*, "'PIRG does not provide a forum for the expression of differing views'" (772 F.2d at p. 1064) but rather presents only one point of view, and the student fee supports only that group.

This crucial distinction places *Galda* in analytical symmetry with other cases upholding a mandatory student activity fee. The court observed that the creation of a forum for expression of diverse views may be a compelling justification for the slight infringement on First Amendment rights, "just as is the need for labor peace in the union dues cases." (772 F.2d at p. 1067.) Clearly, the court viewed the funding of campus organizations as related to the university's educational purpose so long as all student groups are eligible to participate in student activity funding.

Kania v. Fordham (4th Cir. 1983) 702 F.2d 475, is perhaps more apposite. In that case, a group of students at the University of North Carolina relied upon *Abood* to challenge the use of mandatory student fees to fund a student newspaper which advocated views repugnant to them. In concluding that no constitutional infringement was presented, the court first noted the special nature of a public university: "the campus of a public university, at least for its students, possesses many of the characteristics

of a public forum. 'The college classroom with it surrounding environs is peculiarly "the marketplace of ideas."' . . . [Citation.]" (702 F.2d at p. 479, fn. 7.) And the court gave deference to the university's judgment that support of a student newspaper is related to the university's educational mission. (702 F.2d at pp. 479-480.)

Significantly, the court contrasted *Abood* with the evenhanded nature of the communications funded by the compulsory student fees stating that: "In *Abood* the plaintiffs alleged that they had no control over the Union's communications, and that these communications were one-sided presentations of the 'Union's viewpoint.' The mandatory fees in *Abood*, therefore, enhanced the power of one, and only one, ideological group to further its political goals. In contrast, [the student newspaper] increases the overall exchange of information, ideas, and opinions on the campus." (*Kania v. Fordham, supra*, 702 F.2d at p. 480.)

The same analysis is applicable here. The Regents have obviously decided that the educational process extends beyond the classroom and includes extracurricular opportunities for students to be exposed to widely divergent opinions on various topics. The Regents have implicitly concluded that the use of student fees to finance student activities, including student groups that advocate positions on political and ideological matters, is necessary and related to the university's educational purposes. The broad powers granted the university for the governance of its affairs gives the Regents wide discretion to determine the best course for the university's educational mission. We must defer to that decision. *San Francisco Labor Council v. Regents of University of California*, 26 Cal.3d at p. 788.)

Indeed, the funding of the student groups promotes free expression by providing a forum for the exchange of ideas and the advocacy of divergent views. Any attempt by the university or the courts to inhibit the expression of ideas objectionable to some students would itself dangerously encroach upon First Amendment rights

and would be entirely foreign to the firmly rooted concept of a university as a marketplace of ideas.

Moreover, the funding of student groups does not promote a single political point of view. On the contrary, the various funded groups represent diverse philosophical and political views, and funding is equally available to a group no matter what kind of ideological pennant it flies. And no evidence was presented that any group had been denied funding on that basis.[15] The trial court expressly found that any group of (four) students expressing any particular viewpoint was free to register with the university and became eligible for funding.

Plaintiffs' focus on ASUC lobbying organizations' engagement in political as well as educational activities misses the mark. The test is not whether the activity is political, but whether it is germane to the organization's purposes.

The *Abood* court expressly rejected the notion that attaching the adjective "political" to an activity is determinative. The court recognized that by its very nature a public employees' union is involved in political activities to secure approval of public authorities and to obtain necessary budgetary and appropriations decisions. (*Id.*, 431 U.S. at p. 236.) While declining to draw a line between permissible and impermissible political activities, the court held that contributions may be compelled as long as the ideological activities are related to the organization's duties. (*Ibid.*)

Similarly, the Supreme Court found no constitutional impediment to compulsory membership of lawyers in an integrated bar even though bar activities

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[15]On appeal plaintiffs have suggested that ASUC funding is less than evenhanded because most of the funded groups have "leftist" leanings. But plaintiffs presented no evidence at trial to support a claim of discriminatory treatment.

included legislative reform. (*Lathrop v. Donohue*, *supra*, 367 U.S. at pp. 833-834, 843.)[16]

Here, the lobbying activities—confined to student and university issues—are obviously related to ASUC's function.

In conclusion, we reject plaintiffs' claims that the use of student fees to fund various student groups violates plaintiffs' rights of free speech.

B. Establishment of Religion

Plaintiffs next contend that the use of the mandatory activities fee to fund certain student religious groups violates the Establishment Clause. (U.S. Const., Amend. I; Cal. Const., art. I, § 4; art. XVI, § 5.) The contention finds no support in the record.

The trial court made a finding that the funded student activities groups with religious names are cultural in nature. That finding is amply supported by the record. Groups whose activities are essentially "religious," i.e., proselytizing converts by preaching church doctrine or restricting membership to persons sharing their particular faith, are *not* funded. Although some religious groups were *registered* groups in the sense of being authorized to set up informational tables at Sproul Plaza,[17] the groups that

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[16]The *Lathrop* court did not decide whether mandatory bar dues may be used to support the bar's lobbying activities. We note that that question is pending before the California Supreme Court in *Keller v. State Bar of California* (1986) 181 Cal.App.3d 471 [226 Cal.Rptr. 448] review granted Aug. 26, 1986 (SF 25050) (argued Dec. 9, 1987). In other jurisdictions, the courts have applied *Abood* in holding that the bar may use funds for political and ideological activities if germane to the bar's purposes. (*Gibson v. The Florida Bar* (11th Cir. 1986) 798 F.2d 1564; *Petition of Chapman* (N.H. 1986) 509 A.2d 753; *Romany v. Colegio de Abogados de P. R.* (1st Cir. 1984) 742 F.2d 32; *Arrow v. Dow* (D.N.M. 1982) 544 F.Supp. 458; *Falk v. State Bar of Michigan* (1981) 411 Mich. 63 [305 N.W.2d 201].)

[17]It is settled law that once the university makes its facilities available

(continued...)

actually received ASUC funds were cultural and not religious.

III. Other Objections

Plaintiffs also advance a cluster of subsidiary claims of alleged infirmities in the collection and expenditure of the student activity fees. Each of them need only be discussed briefly.

A. Express Authority

Relying on the principle that public funds may not be used to support political causes or activities unless the power to do so has been given in "'clear and unmistakable language'" (*Stanson v. Mott* (1976) 17 Cal.3d 206, 213-220; *Mines v. Del Valle* (1927) 201 Cal. 273, 287), plaintiffs assert that the use of student fees to fund ASUC and its activities has never been expressly authorized. The assertion is demonstrably groundless.

In 1933, the Regents adopted a policy authorizing the levy and collection of a mandatory student fee "whenever requested to do so by two-thirds vote of the student body concerned." In February 1955, a student vote was taken during registration: sixty-eight percent (68%) of the votes cast were in favor of a compulsory student activities fee. The Regents thereupon approved the collection of such fee and authorized use of part of it for ASUC activities.[18]

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[17](...continued)
to some groups, it must make them available to all, even religious groups. (*Widmar v. Vincent* (1981) 454 U.S. 263.)

[18]Plaintiffs' attempt below to challenge the validity of the 1955 vote tally was found barred under the doctrine of laches. That determination by the trial court is sustained by the record, and no injustice is shown. (*Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 624.)

B. Fiscal Supervision

Plaintiffs argue that the university has delegated too much authority to ASUC for allocation of its funds. When the collection of compulsory student body fees was authorized in 1933, they continue, the Regents intended to retain control over the management of the ASUC funds.

The record amply establishes, however, that the Regents retain fiscal supervision over the ASUC and its activities. Among the constitutional powers granted the Regents in administering the university is the power "to delegate to its committees or to the faculty of the university, or to others, such authority or functions as [the Regents] may deem wise. . . ." (Cal. Const., art. IX, § 9, subd. (f).) The Regents have delegated to the chancellors of the several campuses the duty of administration of student government and student activities.

Under the university's written policies, the chancellors are empowered to "make audits of the finances of student governments, exercise control over expenditures of their funds when and to the extent necessary to maintain financial solvency of student governments, and where necessary may take action to ensure that any activity under control of student governments is operated in accordance with sound business practices consonant with University policies and procedures applicable to such practices."

Each spring preceding the next academic year, the ASUC budget is subject to review and approval of the chancellor's office. Each fiscal year, the ASUC undergoes an independent audit, and the auditor's report is sent to the university officials.

In addition, all ASUC Senate meetings are attended and monitored by university representatives. After each meeting, written reports are prepared and sent to the chancellor's delegate, the vice-chancellor of student services.

In sum, the Regents have not abdicated their plenary authority and continue to retain and exercise

ultimate supervisory control over student government and student extracurricular activities.

C. Check or Warrant Disbursement of Funds

Plaintiffs also challenge the method of transferring funds (student activity fees) from the university to ASUC by check drawn upon the university's revolving account payable to the ASUC's separate bank account.[19]

Relying on language contained in section 21 of the original organic act that "expenditures . . . shall be subject to the warrants . . . drawn upon the Treasurer of the University . . . ." (Gen. Law No. 8868; Stats. 1867-1868, ch. 244, § 21, p. 257), plaintiffs claim a valid transfer of funds can only be by warrant drawn on the UC Treasurer. The claim is nonsensical.

The organic act was superseded by the 1879 constitutional enactment which expressly provided that "organization and government [of the university] shall be perpetually continued in the form and character prescribed by the organic Act creating the same . . . ." (Cal. Const., art. IX, § 9.) In 1918, the Constitution was amended deleting the reference to the organic act and instead investing "full powers of organization and government . . ." in the Regents. (Cal. Const., art. IX, § 9, subd. (a).)

Thus, no legal requirement exists that such funds must be transferred by warrant only.

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[19]Student activities fee payments are routinely deposited in the UC Berkeley depository bank account and then immediately transferred to the university's systemwide account controlled by the treasurer of the university. Each quarter, after the total student enrollment is computed, a check drawn on the UC Berkeley revolving account is issued to ASUC in an amount reflecting $7 for each student payment. Funds are then transferred from the systemwide account to the revolving account to reimburse the account.

D. Competitive Bidding

Plaintiffs' further argument that disbursement of the collected student activity fees (some $600,000 per year) violates competitive bidding laws borders on the frivolous.

Competitive bidding procedures apply where applicable by statute "for the letting of construction contracts, sales of real property, and purchasing of materials, goods, and services." (Cal. Const., art. IX, § 9, subd. (a).) The Legislature has provided that the Regents undertake competitive bidding for all contracts for goods and services exceeding $50,000 annually. (Pub. Contract Code, § 10507.) But the statute is obviously directed to contracts between the university and outside suppliers and does not apply to the internal administration of student government.

In any case, the ASUC is unique in being the only group that can create and operate a student government and is, accordingly, exempted from competitive bidding requirements under the "sole source" provisions of a companion statute. (Pub. Contract Code, § 10508.)

E. Support of Private Schools

The use of public funds to support private schools is constitutionally prohibited. "No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools . . . ." (Cal. Const., art. IX, § 8.)

In some obscure manner, plaintiffs contrive an argument that the use of the student activity fees violates this prohibition. First, the constitutional provision is a limitation on the power of the *Legislature* to *appropriate* public money. Furthermore, neither the ASUC nor any of

its funded student activities is a "school" within the meaning of the provision.[20]

F. Political Neutrality of the University

Under the provisions of the Constitution, "The university shall be entirely independent of all political or sectarian influence and kept free therefrom in the appointment of its regents and in the administration of its affairs . . . ." (Cal. Const., art. IX, § 9, subd. (f).)[21] Plaintiffs contend that the mandatory payment of the student activity fee as a condition of enrollment, coupled with the political positions espoused and political and religious groups funded by the ASUC, results in the students being subjected to a "sectarian, political or partisan test" for admission in violation of the university's political neutrality. Again, no merit is discerned.

As previously discussed, only payment of the fee is mandatory; participation in ASUC activities is not. Nor are students obligated to espouse or support any particular political or religious cause or viewpoint as a condition for enrollment. And in the final analysis, any positions taken by the ASUC or by student groups on matters of public concern are those of the student government or the student groups, and not those of the university which has faithfully adhered to the constitutional requirement of political and secular neutrality.

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[20]For the first time on appeal, plaintiffs seek to challenge the $1.50 portion of the mandatory fee earmarked for Ethnic Studies. Failure to raise this objection below forecloses review, and we decline to consider it now. (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1.)

[21]Section 13 of the organic act provided an essentially similar proviso for the political neutrality of the university (Stats. 1867-1868, ch. 244, § 13, p. 254) subsequently incorporated in the 1879 version of article IX, Section 9 of the Constitution.

For each and all of said reasons, the judgment must be and is affirmed.

CERTIFIED FOR PUBLICATION:

_____
Racanelli, P. J.

We concur:

_____
Elkington, J.

_____
Newsom, J.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

AVERELL SMITH and MARINA TREPETIN, individually and as taxpayers of the State of California, ARLO HALE SMITH and ADLAI SMITH, as taxpayers of the State of California, *Plaintiffs,* vs. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA; ASSOCIATED STUDENTS OF THE UNIVERSITY OF CALIFORNIA, an unincorporated association; HERBERT GORDON, as Treasurer for The Regents of the University of California; DAVID S. SAXON, as President of the University of California; ALBERT H. BOWKER, as Chancellor of the University of California at Berkeley, *Defendants.*	
ASSOCIATED STUDENTS OF THE UNIVERSITY OF CALIFORNIA, A CALIFORNIA NONPROFIT, UNINCORPORATED ASSOCIATION, *Plaintiff,* vs. BERKELEY-ALBANY SMALL CLAIMS COURT, BRAD SPARKS, JIMMY HOM, EMILY TAYLOR, ALEXA SMITH, THOMAS KISTLER, and all other persons similarly situated, *Defendants.*	NO. 519977-2 NO. 533997-6 **STATEMENT OF DECISION**

These matters came on regularly for trial on April 16, 1982, in Department 16 of the above-entitled Court, the Honorable Zook Sutton, presiding, sitting without a jury, a jury having been duly waived. The companion cases of *Smith, et al, v. Regents, et al,* No. 519977-2 and *ASUC v. Berkeley-Albany Small Claims court, et al.*, and related cross-complaint, No. 533997-6, were consolidated for all purposes including trial by stipulation of the parties and prior order of this Court.

On March 25, 1982, prior to the commencement of trial before this Court, Department 19 of the above-entitled Court determined that the mandatory student activities fee imposed on all students at the University of California, Berkeley, was constitutional and legal, on its face and as applied and ruled that at trial said ruling should be deemed to be established.

On April 16, 1982, this Court by virtue of the stipulation of all parties considered the effect of the ruling of March 25, 1982, on the remaining causes of action for trial; whether this matter was proper for resolution by jury; and, whether the Associated Students of the University of California (hereafter ASUC) was an unincorporated association so as to have standing as a party in these matters.

Evidence was taken and argument was presented by all parties. Thereafter, on April 22, 1982, this Court ruled that the constitutionality and legality of the Berkeley campus fee had been adjudicated by the March 25, 1982, Order, insofar as the imposition and collection of said fee, only, was concerned. The expenditure and use of said fee remained at issue together with those issues in which summary judgment was denied. The Court also ruled that Plaintiffs in the *Smith* action and Defendants/Cross-Complainants in the *ASUC* action, were entitled to a jury trial as to those issues not previously adjudicated and that, for purposes of standing to sue or be sued in this action, ASUC was an unincorporated association.

Following the ruling of April 22, 1982, Plaintiffs in the *Smith* action and Defendants/Cross-Complainants in the *ASUC* action waived their right to a jury trial. Trial recommenced on April 27, 1982, and continued to May 12, 1982, wherein the evidence was closed and the matter continued by the Court to June 16, 1982. On June 16, 1982, the matter was further continued by the Court to July 2, 1982. On July 2, 1982, this Court filed its Tentative Decision finding for ASUC and the Regents on all issues. Thereafter, on or about July 12, 1982, Plaintiffs in the *Smith* action and Defendants/Cross-Complainants in the *ASUC* action filed a request for a Statement of Decision pursuant to California Code of Civil Procedure, Section 632.

A Statement of Decision was requested as to the following issues: (1) Whether the use and expenditure of the Berkeley campus fee violated Article IX, Section 9(f) of the California Constitution prohibiting political or sectarian influence over the University of California; (2) Whether the use and expenditure of the Berkeley campus fee violated the First Amendment of the U.S. Constitution, Article I, Sections 1, 2 and 3 of the California Constitution, or the Organic Act of 1868, on the ground of compelled expression and association; (3) Whether students were compelled to associate with the ASUC; (4) Whether there was any violation of competitive bidding law by the use or expenditure of the Berkeley campus fee; (5) Whether the use of University property by ASUC violated Article IX, Section 9(f) of the California Constitution or was otherwise unlawful or ultra vires; (6) Whether the use and expenditure of the Berkeley campus fee funds violated State law, including a requirement that all University funds be expended on warrants drawn on the university Treasurer; (7) Whether the collection of the Berkeley campus fee was rendered invalid due to alleged violation of University regulations on approval and increase of student fees; (8) Whether use of University funds to pay the costs of collecting the Berkeley campus fee is unlawful or ultra vires; (9) Whether the use of the Berkeley campus fee violates the Establishment Clause of the U.S. Constitution or the

California Constitution, Article I, Section 4, Article IX, Section 9(f) or Article XVI, Section 5; and (10) Whether the use and expenditure of the Berkeley campus fee by ASUC violates Article IX, Section 8 of the California Constitution.

Issues (9) and (10), as aforementioned, were not pleaded in either the *Smith* complaint or the *AUSC* cross-complaint. As to the remaining issues, issues (2) and (3) are the same and issues (1), (5)/(6), and (8) are intertwined. Those issues will be treated collectively.

FACTS.

Evidence at trial established that following a vote of the student body a mandatory student activities fee, known as the Berkeley campus fee, has been imposed by the Regents on all students attending the University of California, Berkeley, since 1955. Since early in this century the Associated Students of the University of California (hereafter ASUC) has been delegated responsibility for administering student government on the Berkeley campus by the University. It is the authorized representative of student government and student activities.

For the purpose of standing to sue or be sued in this action, the ASUC qualifies as a California, non-profit unincorporated association, in its own right. For the purpose of the control and expenditure of the Berkeley campus fee, the ASUC acts by authority delegated to it by the Chancellor of the University of California.

Membership in the ASUC is voluntary and is limited to regularly enrolled students on the Berkeley campus who choose to join the organization. It is governed by its Constitution, Rules and Regulations and Policies and Procedures, and applicable University Rules and Regulations.

The ASUC is supported by revenues from its various commercial activities on campus and by the Berkeley campus fee revenue. The annual cost of funding student government exceeds the revenue received from the

Berkeley campus fee, which is only used to fund student government on the campus. Consequently, ASUC revenues from its commercial activities are used to provide additional funding for student government activities on the campus.

Berkeley campus fee funds are collected by the University from regularly enrolled students at the time of registration. Of the $12.50 per student currently collected, $4.00 is retained by the University to fund Bond payments and maintenance of the Student Union Building. $7.00 is turned over to ASUC by University draft which is deposited in the ASUC General Fund. $1.50 is turned over to ASUC by University draft which is deposited in a separate account for the benefit of the Ethnic Studies Program at the University. The $1.50 collected for Ethnic Studies is the result of a vote by the student body approving said fee in 1969.

The $7.00 portion of the Berkeley campus fee is used to partially fund student government and student activities. In order to qualify for funding, a student activities group must be registered with the University. Any group desiring funding registers with the University and submits a written application to the ASUC Senate Finance Committee which reviews that request and makes its recommendation to the full ASUC Senate as part of the annual budget. At the time of trial there were approximately 150 funded student activities groups on the campus. Each year the ASUC operates on a budget which includes funding for the student activities groups. That budget is approved prior to taking effect in the next academic year. Prior to any expenditures being made by the ASUC, that budget is made available to the University for review. At the end of each fiscal year the ASUC is audited by an outside auditor. That report is made available to the University for review.

During the academic year, student groups are funded on a reimbursement basis. For other than minimal expenses, each student group submits a voucher for

reimbursement of an expense which is consistent with the line item budget approved by ASUC in the prior year. Until such time as payment is made on the voucher, the ASUC retains control over all Berkeley campus fee funds forwarded to it by the University.

In addition to funding student activities groups, Berkeley campus fee funds are used to fund student government on the campus which includes operation expenditures for the AUSC Senate and various ASUC continuing projects including lobbying activities, tenant assistance activities and draft counselling information.

The Regents of the University of California ("The Regents") is a corporation which, pursuant to Article IX, Section 9 of the Constitution of the State of California, administers the public trust known as the University of California, with full powers of organization and government thereof. The Regents has all powers necessary or convenient including the powers to delegate authority, for the effective administration of the University, including the power to appoint, constitute or authorize student governments.

The Regents has delegated authority over the administration of student government and activities to the Chancellor of the Berkeley campus who in turn, has delegated authority for the day to day operation of student activities to the ASUC. In addition, two University Vice-Chancellors, the Vice-Chancellor for Student Services and the Vice-Chancellor for Business and Administration Services are the University Administration personnel who act as liaison with the ASUC in the area of student government and activities on the Berkeley campus. Insofar as the ASUC is concerned, management of the day to day operations for student government and activities are the responsibility of the staff Executive Director and Staff Director of Student Affairs as well as those student leaders elected or appointed to oversight positions.

The Law.

Before turning to a treatment of the individual issues, it is important to be mindful of the relief requested. Plaintiffs[22] sought injunctive and declaratory relief against continuance of the imposition, collection and use of the Berkeley campus fee. Defendant, ASUC, sought declaratory relief as to the constitutionality of the Berkeley campus fee.

In order for this Court to grant injunctive relief there must be evidence of threatened injury. It cannot be granted as to wrongs which are completed. It must appear with reasonable certainty that the wrongful acts complained of will be continued or repeated for injunctive relief to be granted. *Gold v. Los Angeles Democratic League* (1975) 40 CA 3rd 365, 372-373. The evidence in this case indicated that there have been isolated instances in the past wherein University and ASUC Rule and Regulations have been violated in areas involving partisan political activities, ballot measure positions and alleged misuse of University name in connection with student activities, failure to file copies of posters and announcements in advance with Office of Student Activities and failure to attach copies of announcements to mid-year reports. In view of the relatively few examples of this type of conduct, the court does not detect any pattern of neglect or likelihood of recurrence warranting court intervention by way of injunction. Accordingly, Plaintiffs' request for permanent injunctive relief is denied.

Proceeding to an analysis of the substantive issues, at the outset, it was established by the Ruling of March 25, 1982, that the imposition and collection of the Berkeley campus fee was determined to be constitutional and legal

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[22]For the purposes of this Statement of Decision Plaintiffs in the *Smith* action and Defendants/Cross-Complainants in the *ASUC* action will be referred to as Plaintiffs. Defendants in the *Smith* action and Cross-Defendants in the *ASUC* action will be referred to as Defendants. ASUC, also a plaintiff in the *ASUC* action will be referred to as Defendant.

both in view of the federal and state constitutional claims presented. The aforementioned being the case, this Statement of Decision will discuss and analyze the Berkeley campus fee only insofar as the remaining issues presented for trial; namely, whether the use and expenditure of said fee was constitutional and legal.

(1) The Use and Expenditure of the Berkeley Campus Fee Does Not Violate Any Federal or State Constitutional Rights of Plaintiffs on the Ground of Compelled Membership, Association or Expression. (Issues 2 and 3)

Whenever a court is asked to consider delicate issues of the academic community, it should do so with special caution. *Healy v. James*, 408 U.S. 169, 171 (1972); *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503 (1969). That is especially true when dealing with alleged violation of First Amendment rights. Courts have consistently been unwilling to interfere in those areas which educators consider to be necessary for the successful maintenance of an intellectually stimulating and challenging academic atmosphere for learning. The justification employed for upholding mandatory student activities fees is not based on the ground that students have no rights but rather on the ground that such fees are based on valid rules and policies which are educationally sound and therefore do not interfere with the constitutional rights of students. *Veed v. Schwartzkopf* (D.C. Neb. 1973) 353 F.Supp. 149, affd. 478 F.2d 1407 (8th Cir. 1973), cert. den. (1974) 414 U.S. 1135 [38 L.Ed. 2d 760, 911 S. Ct. 878]; *Arrington v. Taylor* (M.D.N.C. 1974) 380 F.Supp. 1348; *Good v. Associated Students of the University of Washington* (1975) 86 Wn.2d 105 [542 P.2d 762]; *Larson v. Board of Regnts of the University of Nebraska* (1973) 189 Neb. 688 [204 N.W.2d 568]; Cf. Gibbs and Crisp, *First Amendment Rights v. Mandatory Student Activity Fees*, 8 Journal of Law and Education 195 (1979).

Proceeding then to an analysis of the First Amendment claims of the parties, in discussing the scope of review of First Amendment claims, the Supreme Court in *Elrod v. Burns*, 427 U.S. 347 at 362 (1976) said:

> "It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny."

The action must further some vital governmental end by a means that is least restrictive of freedom of belief and association. In achieving that end,the benefit gained must outweigh the loss of constitutionally protected rights.

The appropriate starting point for a discussion of Federal constitutional issues is *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). In *Abood*, the Court held unconstitutional compelled union shop fees insofar as they were used for political and ideological purposes unrelated to collective bargaining. In effect, the court sets up two different standards, a flexible standard for funds spent on collective bargaining, and a restrictive standard for funds collected for political purposes.

Courts have followed this line of reasoning in a number of cases involving relatively noncontroversial activities even before *Abood* was decided. For example, in *Arrington, supra*, at 1361 the Court applied the test set forth by Justice Harlan in *Lathrop v. Donohue*, 367 U.S. 820 (1981), a case in which a Wisconsin attorney sued to recover compulsory dues paid the Wisconsin Bar Association in alleged violation of the Fourteenth Amendment:

> "Finally Justice Harlan discussed the assertion that to compel a person to pay dues to an organization which espouses views contrary to his own in effect compels him to adopt and affirm those views. The difference in degree between, on the one hand, being required to affirm a belief or a

> particular position and adopt that belief as one's own and, on the other hand, being required to contribute dues to an association which may ultimately adopt views as a group contrary to those held by the dues payor, is of such a magnitude as to amount to a difference of substance. The state's purpose in establishing the bar association was not to promote any particular position or program nor to compel its members to subscribe to positions ultimately adopted by it. Although pure motive would never permit a government to require a person to espouse a position he disagreed with, that motive becomes relevant when the connection between the payment of the plaintiff's dues and the views of the bar association with which he disagrees is factually so remote."

In *Veed v. Schwartzkopf, supra,* students challenged the imposition of mandatory student fees for use in subsidizing a student newspaper, a speaking program and a student association. The Court declared the fee constitutional because the university had not played the role of advocate for the particular philosophy expressed and the fees had not been used to support or advance any particular political or personal philosphy. In *Good, supra,* the Court held that the Board of Regents had statutory authority to make an allocation of student fees for the purpose of providing student activities and services to a separate nonprofit corporation if such an entity is in essence an agency of the university. Students could be required to pay such fees unless the corporation exceeded statutory authority or espoused one particular viewpoint.

These decisions provide guidance to the analysis of the constitutional attack in this case. Consistent with the Court conclusions in *Veed, supra,* the Plaintiffs have not been required to profess or subscribe to a specific social, political, economic, religious or moral view, nor have they been restrained in any way from adopting, professing or practicing their own individual ideologies. Plaintiffs have simply been required, as are all students at the University, to pay a student fee. The fact that the fee is used to support student government activities[23] with which Plaintiffs disagree and which they choose not to endorse, places them in no different position than that of any other student with objections as to how the University allocates its resources. As the Court in *Good, supra,* indicates, the University cannot alter its practices and policies to accommodate the private concerns of these Plaintiffs or any other dissident minority group. Rather, the University is entitled to use these fees, which it, in its discretion, has determined to be in the best interests of its overall student population. Nor are Plaintiffs forced to join the ASUC. Membership in that organization is purely voluntary. Payment of a mandatory student activities fee is not tantamount to forced membership in the student government organization. *Good, supra.*

The fees at issue here are not arbitrary, capricious, or discriminatory nor do they promote or impose one particular viewpoint over another. Any group of students expressing any particular viewpoint are free to register with the University, apply for funding and receive consideration for funding so long as they comply with applicable University and ASUC Rules and Regulations. There is no requirement that any registered student group be funded. They may choose not to request funding. Nor is there any requirement that students must form a group and register with the University or with the ASUC. Accordingly, they

[23]Including funding of student activities groups, ASUC Operations groups, lobbying activities and ASUC Senate activities.

are not required to associate with ASUC. Under applicable University Rules and Regulations they may use University facilities as members of the student body.

The fee is used consistent with the practice of a University to provide a broad range of student services of which student government is but one component. Such use represents a legitimate University-related educational activity and falls within the broad discretion accorded The Regents. The determination of what is to be regarded as educational is best made by the Regents. They have the general rule-making power in regard to the University *San Francisco Labor Council v. Regents of the University of California,* 26 C.3d 785 at 788 (1980). They have delegated responsibllity for student activities to the Chancellor of the Berkeley campus. The guidelines of the University permit expenditure of compulsory student fees for university-related purposes.

The Chancellor has interpreted these regulations to limit the use of funds for student organizations as follows: They may not be used for partisan political activity, off-campus political activity, and may only be used for political activity on campus in accordance with regulations pertaining to time, place and manner of expression.

Subject to these conditions, student organizations may take positions on issues of public concern with the goal of bringing a variety of viewpoints to the campus. The authorities support the proposition that the Board of Regents and their delegated authorities are in the best position to determine the educational value of student activities. *Healy v. James,* 408 U.S. 169.

In addition, Paragraph 63.00 of the "Policies Applying to Campus Activities, Organizations and Students," University of California, effective January 3, 1979, introduced into evidence as Exhibit 9, permit U.C. student governments, including the ASUC, to take positions on public issues and lobby federal, state or local governments, on university-related issues.

The exacting scrutiny test as applied in *Elrod, supra,* requires the existence of three factors to justify a restriction of First Amendment rights: (1) A compelling governmental interest be present; (2) The government action must further that governmental interest; (3) The interest must be furthered in a manner which is least restrictive of belief and association.

As has been indicated, the educational value of student activities and their participation in student government fulfills the first two requirements. But, is it necessary to finance these activities through a mandatory student fee which may affect the First Amendment rights of objecting students? As an alternative, the Court could require the ASUC to restrict funding to benign non-controversial groups such as campus newpapers, speakers bureaus or other groups which could be characterized as apolitical. There are problems with this approach. As stated in *Lace v. University of Vermont,* 303 A.2d 475 at 480 (1973):

> "The fact that certain ideas are controversial and wholly disagreed with does not automatically make them noneducational."

The second alternative to the existing system could involve a refund provision. While this would result in substantial administrative inconvenience for the University, the Supreme Court has indicated that administrative inconvenience is not sufficient justification for restrictions on First Amendment rights. However, it is appropriate to estimate the effect a refund provision would have on university funding for campus organizations. It is reasonable to conclude that the availability of the refund would effectively destroy the current system of student funding of student organizations.

Under these circumstances the Court finds and holds that the use and expenditure of the Berkeley campus fee is related to the educational purpose for which they

were imposed and to that extent complies with the requirements as enunciated in *Abood v. Detroit Board of Education, supra.* Plaintiffs First Amendment and related State constitutional claims are not violated on grounds of forced membership, association or expression.

(2) The Use and Expenditure of the Berkeley Campus Fee Does Not Violate Article IX, Section 9 of The California Constitution, The Organic Act of 1868, or Any Other University Rule and Regulation. (Issues 1, 5, 6 and 8).

The evidence showed that Berkeley campus fee funds are collected by the University at registration and transferred to ASUC for partial funding of student government. The University retains control over the funding process within ASUC by its representative to ASUC Senate, its review of all ASUC budgets, its receipt and review of the annual ASUC audit and the inherent responsibility of the Chancellor for the fiscal soundness of student government. The University draft to ASUC each quarter is not by warrant. None are in use by the University at this time.

The Regents of the University of California, as a constitutionally created arm of the State, has virtual autonomy in self government. In promulgating the authority to be vested with the Regents, the constitutional framers intended that these powers include general rule-making and policy-making power with regard to the University as well as the power to operate, control and administer the University as a public trust. (Cal. Const., Art. IX, Section 9; *William v. Wheeler* (1913) 23 Cal. App. 619; *Regents of University of California v. City of Santa Monica* (1978) 77 Cal. App. 3d 130; *Goldberg v. Regents of the University of California* (1967) 248 Cal. App. 2d 867, 874; *Newmarker v. Regents of University of California* (1958) 150 Cal. App. 2d 640, 645). Decisions interpreting the scope of regental authority in a variety of areas confirm this

conclusion. The Regents have been characterized as "a branch of the state itself." *Pennington v. Bonelli* (1936) 15 Cal. App. 2d 316, 321. And, as a statewide administrative agency possessing virtually exclusive power with regard to the internal regulation of the University. *Hamilton v. Regents* (1934) 293 U.S. 245 79 L.Ed. 343, 55 S.Ct. 197; *Regents of University of California v. Superior Court* (1970) 3 Cal. 3d 529, 540, fn. omitted; *Ishimatsu v. Regents of University of California* (1968) 266 Cal.App. 2d 854; *Cal. State Employees' Assn. v. Regents of University of California* (1968) 267 CA 2d 667; see also 30 Ops. Atty. Gen. 162, 166.

The Regents enjoy wide discretion in the operation of policies and practices essential to the University's missions of education, research, and public service within this State. This broad discretion extends to the imposition, collection and distribution of mandatory student fees to support student government as a condition of attending the University.

By creating an internal mechanism calling for the transfer of Berkeley campus fee funds to ASUC for the administration of student government, while retaining overall powers of review and control, so as to encourage the administration and management of student government by students, themselves, or their democratically elected student representatives, the University has lived up to the Regents' obligations in this area pursuant to Article IX, Section 9 of the State Constitution.

Nor has there been any violation of the Organic Act of 1868 by the aforementioned mechanism. The origins of the University and the Regents are found in the Organic Act of 1868 passed by the State Legislature, which authorized the chartering of a State University known as The College of California. The governing body of the new State University was to be The Regents. That governmental structure was codified in Article IX, Section 9, of the California Constitution of 1868. Article IX, Section 9, of the Constitution of that year specifically referred to the Organic Act of 1868 as legal authority for the creation of the

aforementioned internal governmental structure. There was also a reference to the use of warrants by The Regents.

In 1879, Article IX, Section 9, of the California Constitution was amended. The University of California was to be treated as a public trust. Organization and management of the University was removed from the State Legislature and transferred to the Regents, which was given full power to govern. The organization and government of the University was to be continued in perpetuity in the form and character prescribed by the Organic Act of 1868. The Regents were incorporated as a separate entity in 1880.

Article IX, Section 9, was amended again in 1918. That Amendment altered the composition of the Regents and omitted any reference to the Organic Act of 1868. It also omitted any reference to the use of warrants. It is from 1918 that the Regents took the form and character of a constitutional department of the State. Since 1918, the Organic Act of 1868 has ceased to have any material meaning insofar as the governance of the University of California is concerned.

The evidence indicated warrants were used in the late 19th century in this State by large institutions who could not rely on banks to transfer assets. There is no longer any reason for this anomoly. Assets are commonly transferred by the use of checks or drafts drawn on the account of any given institution. Obviously, the deletion of any reference to the use of warrants in Article IX, Section 9 of the California Constitution since 1918 recognized that fact. Warrants are no longer required to transfer University assets and are, in fact, not used the University in any of its activities. Any reference to the required use of warrants by the University is superceded by the amended and current version of Article IX, Section 9 of the California Constitution which has deleted that requirement.

Article IX, Section 9(f) does require that the Regents be independent of all political and sectarian influence much as was required in the Organic Act of 1868.

That does not mean, however, that student activities groups or student government cannot take positions on public issues as is permitted on the Berkeley campus.

Based upon the foregoing, it also follows that assuming University funds are used to pay the cost of collecting the Berkeley campus fee, such use is lawful and consistent with the University's educational mission. There was, however, no evidence introduced which substantiated a finding that any portion of University funds were used to collect the Berkeley campus fee only. Rather whatever normal administration expenses were incurred by the University were incurred for student registration, generally, and would be incurred even if the Berkeley campus fee were not collected by the University from registering students.

The same is true insofar as the rental of University property to ASUC. The evidence showed the ASUC, like departments of the University, was permitted to use University autos, photocopy centers, mail, telephone, etc. in return for payment of normal fees to the University for the use of said facilities. Insofar as the use and expenditure of the Berkeley campus fee is concerned, ASUC acts as the agent of the University. There is nothing illegal or improper in the above stated arrangement. The Court so finds.

The above being the case, there can be no finding that any of the individual defendants acted beyond the scope of his authority in the use and expenditure of the Berkeley campus fee. The Court so finds.

(3) Competitive Bidding Is Not Required For The Administration Of The Berkeley Campus Fee By ASUC. (Issue 4).

Plaintiffs claim that the ASUC must engage in competitive bidding pursuant to Education Code 92667. This legislation was adopted in 1977 and applies to University contracts with third parties. The University-

ASUC relationship regarding student government pre-existed this legislation by many years. Further, Education Code 92668 specifically exempts unique servies from competitive bidding. The Court finds administration of student government falls within that exemption.

(4) The 1955 Student Body Vote Establishing A Mandatory Student Activities Fee Was Proper And Is Valid. All Subsequent Fee Increases Were Consistent with University Rules and Regulations. (Issue 7)

Plaintiffs contend that the 1955 student body election for mandatory fees was void. That argument must be rejected on several grounds. First, the March 25, 1982, Ruling of this Court previously determined that the mandatory fee was constitutional and legal on its face and as applied. In so doing, necessarily found that the 1955 election was valid.

Further, apparently eight percent of those voting at that election had their ballots invalidated. This raised the question of whether two-thirds of the ninety percent of the student body voting had affirmed some form of mandatory fee. A special committee of the Regents reviewed the results of the election before recommending adoption of the fee, which was then adopted by the full Board of Regents.

The Court finds that 2/3 of the students voting, voted for the imposition of a mandatory student activities fee and that said vote satisfied the Regents' rule then in effect governing the imposition of a mandatory student activities fee.

Finally, the fee has been in effect for 27 years and laches bars the raising of the issue.

(5) The Use and Expenditure of the Berkeley Campus Fee Does Not Violate the Federal Establishment Clause or the California Constitution. (Issue 9)

Plaintiffs contend the use and expenditure of the Berkeley campus fee constitutes support of religious activities in violation of the United States and California Constitutions. This particular issue was not raised by any of the allegations contained in the *Smith* complaint or the *ASUC* cross-complaint. It appears to have been raised for the first time in Plaintiffs' pre-trial statement of March 25, 1982, which was not converted into a pre-trial order. Consequently, that issue was not properly before the Court.

Nonetheless, the evidence showed no violation of the prohibition against religious establishment in either the United States or California Constitutions. Student religious groups are permitted to register with the University. They are permitted the use of University facilities. They are not normally funded by ASUC where their activities are essentially religious in character i.e., prosletizing converts by spreading church doctrine or restricting membership to members of their particular faith only (a violation of University and ASUC rules prohibiting discrimination in membership). Where their activities are not religious but cultural, they may be funded. There is a sufficient internal mechanism by which ASUC is able to determine the nature of the activities for which funding is requested. Such activity does not violate the U.S. Constitution. *Widmar v. Vincent*, 50 L.W. 4062 (1981). Nor does it violate the California Constitution.

(6) The Use and Expenditure of the Berkeley Campus Fee by ASUC Does Not Violate Article IX, Section 8 of the California Constitution. (Issue 10).

Plaintiffs contend that the transfer of Berkeley campus fee funds from the University to ASUC constitutes a violation of Article IX, Section 8 of the California

Constitution. Again, this issue has not been raised by any of the allegations contained in the *Smith* complaint or the *ASUC* cross-complaint. It appears to have been raised for the first time in Plaintiffs' pre-trial statement of March 25, 1982, which was not converted into a pre-trial order. Consequently, that issue was not properly before this Court.

In any event, the transfer of Berkeley campus fee funds from the University to ASUC does not violate Article IX, Section 8 of the California Constitution. First, although Berkeley campus fee funds are transferred from the campus treasurer to the ASUC general fund following registration, the University maintains sufficient control, as indicated elsewhere in this Statement, to monitor the use and expenditure of the funds in question. Second, in the administration of the Berkeley campus fee the ASUC acts as the delegatee of the Chancellor of the Berkeley campus and is, in effect, the agent of the University. Consequently, the funds are not transferred to a private third party, but rather to an agent of the University that is subject to all appropriate University Rules and Regulations governing the use and expenditure of such funds. Finally, Article IX, Section 8 prohibits the use of public funds for the support of any sectarian or demoninational school or any school not under the exclusive control of the officers of public schools. It is directed against the use of public funds for the support of religious or private schools (*Board of Trustees of Leland Stanford Jr. University v. Cory* (1978) 79 C.A. 3rd 661). It is not applicable to the use and expenditure of Berkeley campus fee funds by ASUC.

Neither the Regents, its individual officers nor the ASUC are barred by principles of collateral estoppel based upon the ground that the issues before this court were disposed of in the 1976 matter entitled Brad C. Sparks and Donald L. McEachron, Plaintiffs, versus Albert H. Bowker, CHANCELLOR at Berkeley Representing the Regents/U.C. and Assoc. SUC, Alameda County Superior Court Action No. 494555-6.

Let Judgment be entered for ASUC, Regents, Herbert Gordon, David S. Saxon, Albert H. Bowker, and Ira M. Heyman, accordingly.

DATED:

ZOOK SUTTON
Judge of the Superior Court

ENDORSED
FILED
SEP 30 1982
RENE C. DAVIDSON, County Clerk
By: Elaine Garcia, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

AVERELL SMITH and MARINA TREPETIN, individually and as taxpayers of the State of California, ARLO HALE SMITH and ADLAI SMITH, as taxpayers of the State of California, *Plaintiffs,* vs. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA; ASSOCIATED STUDENTS OF THE UNIVERSITY OF CALIFORNIA, an unincorporated association; HERBERT GORDON, as Treasurer for The Regents of the University of California; DAVID S. SAXON, as President of the University of California; ALBERT H. BOWKER, as Chancellor of the University of California at Berkeley, *Defendants.*	)
ASSOCIATED STUDENTS OF THE UNIVERSITY OF CALIFORNIA, a CALIFORNIA NONPROFIT, UNINCORPORATED ASSOCIATION, *Plaintiff,* vs. BERKELEY-ALBANY SMALL CLAIMS COURT, BRAD SPARKS, JIMMY HOM, EMILY TAYLOR, ALEXA SMITH, THOMAS KISTLER, and all other persons similarly situated, *Defendants.* AND RELATED CROSS-COMPLAINT	) NO. 519977-2) NO. 533997-6) JUDGMENT

This cause came on regularly for trial on April 16, 1982, in Department 16 of the above-entitled Court, the Honorable Zook Sutton, presiding, sitting without a jury, a jury having been duly waived, and the two causes entitled *Smith, et al. v. Regents, et al.*, Action No. 519977-2, and *ASUC v. Berkeley-Albany Small Claims Court, et al.*, and related cross-complaint, Action No. 533997-6, having been consolidated for all purposes including trial.

In the case of *Smith, et al. v. Regents, et al.*, Action No. 519977-2, Plaintiffs, Averell Smith, Marina Trepetin and Adlai Smith appeared by their attorney, Philip A. Larrabee. Plaintiff, Arlo Hale Smith, Jr., appeared on his own behalf. Defendant, Associated Students of the University of California appeared by their attorney, E. Mark Himelstein. Defendants, Regents of the University of California, Herbert Gordon, David S. Saxon, Albert H. Bowker, appeared by their attorney, Fred Takemiya.

In the case of *ASUC v. Berkeley-Albany Small Claims Court, et al.*, and related cross-complaint, Action No. 533997-6, Plaintiff and Cross-Defendant, Associated Students of the University of California, appeared by their attorney E. Mark Himelstein. Defendant and Cross-Complainant, Alexa Smith appeared by her attorney Philip A. Larrabee. Defendants and Cross-Complainants, Jimmy Hom, Emily Taylor and Thomas Kistler appeared by their attorney Arlo Hale Smith, Jr. Defendant and Cross-Complainant, Brad Sparks appeared in his own behalf. Defendant Berkeley-Albany Small Claims Court did not appear. Cross-Defendants Regents of the University of California, David S. Saxon, Herbert Gordon, Albert H. Bowker and I. Michael Heyman, sued as Ira Heyman, appeared by their attorney, Fred Takemiya.

Evidence both oral and documentary, having been presented by all parties, the cause having been argued and submitted for decision, and the Court on request of

Plaintiffs in the *Smith* action and Defendants and Cross-Complainants in the *ASUC* action having caused to be made and filed herein its written statement of decision.

IT IS ORDERED, ADJUDGED AND DECREED, that,

1. In the case of *Smith, et al. v. Regents, et al.*, Action No. 519977-2, Defendants, Associated Students of the University of California, Regents of the University of California, Herbert Gordon, David S. Saxon and Albert H. Bowker and each of them shall have judgment against Plaintiffs, Averell Smith, Marina Trepetin, Adlai Smith and Arlo Hale Smith, Jr., and each of them, as to all causes of action of the complaint, herein, together with costs of suit.

2. In the case of *ASUC v. Berkeley-Albany Small Claims Court, et al.* and related cross-complaint, Action No. 533997-6, Plaintiff, Associated Students of the University of California shall have judgment against Defendants, Alexa Smith, Jimmy Hom, Emily Taylor, Thomas Kislter and Brad Sparks and each of them as to the third cause of action of the complaint, herein, together with costs of suit. Cross-Defendants, Associated Students of the University of California, Regents of the University of California, David S. Saxon, Herbert Gordon, Albert H. Bowker and I. Michael Heyman shall have judgment against Cross-Complainants, Alexa Smith, Jimmy Hom, Emily Taylor, Thomas Kistler and Brad Sparks and each of them, as to all causes of action of the Cross-Complaint, herein, together with costs of suit.

3. In the case of *ASUC v. Berkeley-Albany Small Claims Court, et al.*, and related cross-complaint, Action No. 533997-6, the trial court having previously granted ASUC's and Regents', et al. motion for summary adjudication of the issues as to the constitutionality and legality of the Berkeley campus fee, on its face and as applied, on March 25, 1982, Plaintiff and Cross-Defendant ASUC and Cross-Defendants Regents, Gordon, Saxon, Bowker and Heyman, and each of them, shall have judgment as to that issue against

Defendants and Cross-Complainants Brad Sparks, Jimmy Hom, Emily Taylor, Alexa Smith and Thomas Kistler, and each of them, together with costs of suit.

4. In the case of *ASUC v. Berkeley-Albany Small Claims Court, et al.*, Action No. 533997-6, the trial court having previously granted Defendants Jimmy Hom, Emily Taylor and Thomas Kistler's motion for partial summary judgment as to the First and Second Causes of Action, on June 30, 1981, Defendants, Jimmy Hom, Emily Taylor and Thomas Kistler, and each of them, shall have judgment against Plaintiff, Associated Students of the University of California, as to the First and Second Causes of Action of the complaint, herein, only.

Dated: September 30, 1982

Zook Sutton
ZOOK SUTTON
Judge of the Superior Court

(3)

Supreme Court, U.S.
FILED
AUG 11 1993
OFFICE OF THE CLERK

No. 93-82

In the

Supreme Court of the United States

October Term, 1993

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ASSOCIATED STUDENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,

Petitioners,

v.

AVERELL SMITH, ARLO HALE SMITH, ADLAI SMITH, BRAD SPARKS, JIMMY HOM, EMILY TAYLOR, ALEXA SMITH, THOMAS KISTLER,

Respondents.

Petition for Writ of Certiorari to the California Supreme Court

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May a state university, consistent with the First Amendment, compel all students to finance on-campus political groups whose educational function is merely incidental to their political goals?

2. May a state university, consistent with the First Amendment, compel all students to finance the adoption and publication of ideological viewpoints with which the students disagree?

3. May a state university, consistent with the First Amendment, compel all students to finance lobbying of state and city governments on a variety of issues with which the students may disagree?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES CITED iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 8

ARGUMENT 9

I. CALIFORNIA JUDICIAL PROCEEDINGS ARE NOT YET FINAL 9

II. THE DECISION DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS 11

CONCLUSION 14

TABLE OF AUTHORITIES CITED

Page

Cases

Abood v. Detroit Board of Education,
431 U.S. 209 (1977) 13

Carroll v. Blinken, 957 F.2d 991
(2d Cir. 1992) 9,11-14

Chicago Teachers Union v. Hudson,
475 U.S. 292 (1986) 10,13

Galda v. Rutgers, 772 F.2d 1060
(3d Cir. 1985) 9,12,14

Keller v. State Bar of California,
496 U.S. 1 (1990) 13

Statutes

Cal. Code of Civil Procedure § 526a 2

Rules

California Rules of Court, Rule 977 3

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STATEMENT OF THE CASE

This case does not concern financial support of the chess club. Instead, the issues before the court below

concerned a sensitive balancing of fundamental First Amendment rights with the educational mission of the university.

The case before the Court does not concern a challenge to the curriculum of the university. Instead, at issue is the use of compelled student fees by an autonomous student organization.

Respondents were students at the University of California at Berkeley in 1979 or state taxpayers.[1] In order to register for classes, the students were compelled to pay a student activities fee, most of which was turned over to the student government,[2] the Associated Students of the University of California (ASUC). These funds made up approximately 60% of ASUC's total budget, the remaining funds coming from commercial operations such as the book store. These funds were spent on a variety of activities, only

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[1] Respondents Jimmy Hom, Alexa Smith, Averell Smith, and Brad Sparks were students at the university. Respondents Arlo Smith and Adlai Smith were named as plaintiffs below as taxpayers pursuant to California's taxpayer standing law. Cal. Code of Civ. Proc. § 526a.

[2] During discovery in this case ASUC stated that they could not "truthfully admit or deny" the statement that it was the recognized "student government of the University of California." Record at 682, 706. Instead, the most ASUC would admit to was that there was an oral understanding between it and the university by which the university recognized the ASUC as a "California non-profit unincorporated association." Record at 706. Any further official connection with the university was dependent on pending negotiations between ASUC and the university. *Id.*

three of which are at issue here: (1) lobbying of city and state governments; (2) adoption of ideological resolutions by the ASUC senate; and (3) financing of campus political groups.

The Structure of the ASUC. The ASUC describes itself as an "autonomous constituency of the university community." Record (R.) at 485.[3] Contrary to the suggestion in the petition, the university exercises little control over the activities of the ASUC. Indeed, in quoting from the appendix petitioner leaves out a crucial portion of the sentence, completely changing the meaning of the passage in question.[4] The quote in Footnote 1 of the petition leaves the impression that the university exercises control over the ASUC to ensure compliance with university policy. The language deleted, however, makes clear that the university's

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[3] References to the record are to the Appellants' Appendix in Lieu of Clerk's Transcript that was filed in the court below.

[4] Petitioners' statement of facts relies heavily on the superseded opinion of the California Court of Appeal. Under California law, this opinion is not citable for such a purpose. California Rules of Court, Rule 977. In any event, it is noteworthy that in coming to the opposite conclusion of the Court of Appeal the California Supreme Court did not make the same factual findings as the intermediate appellate court. Thus, the facts on which petitioners rely in their statement of the case are not those relied upon by the California Supreme Court in its decision. Indeed, the California Supreme Court specifically criticized some of the factual conclusions of the Court of Appeal. *E.g.*, Appendix to Petition for Writ of Certiorari (Pet. App.) at 23a-24a.

power is limited. The full quote, with petitioners' deletion in italics, is as follows: "[The university] may take action to ensure that any activity under control of student governments is operated in accordance with *sound business practices consonant with* university policies and procedures *applicable to such practices*." Pet. App. at 91a. Control over student government expenditures can only take place "to the extent necessary to maintain financial solvency." *Id.*

In this case, there is nothing in the record to establish that the university either controlled, approved, or disapproved of the expenditures at issue. Instead, the record indicates that the university simply turned over the compelled fees to the ASUC for disposition as ASUC saw fit.

Lobbying Activities at Issue. Compelled fees were used to support two different lobbying groups: the ASUC Municipal Lobby and the University of California Lobby. The Municipal Lobby lobbied the City of Berkeley on issues from rent control to nuclear weapons and divestment in companies doing business with South Africa. Pet. App. at 4a; R. at 979. The Municipal Lobby was also active in endorsing student candidates for municipal office. Pet. App. at 4a. The University of California Lobby had a perspective that was at once less global than the Municipal Lobby yet was concerned with issues throughout the University of

California system. That lobbying included support for a proposal to finance abortions with student fees, opposition to budget cuts for the university, and support for continued mandatory student fees. *Id.* Of course, the University of California Lobby did not limit itself solely to university issues. The lobby also supported a constitutional amendment enacting a journalist shield law, supported lowering the drinking age from 21 to 19, and opposed outlawing the granting of preferences on the basis of race. R. at 994. When these positions were taken, the lobbyists represented to the Legislature that they spoke on behalf of *all* University of California students. R. at 969.

Ideological Resolutions Adopted. The ASUC Senate, a branch of the student government at the Berkeley campus, did not limit its activities to governance of student affairs. Instead they adopted resolutions supporting gay rights and voting rights for ex-convicts. R. at 692-93, 703. Other resolutions opposed nuclear weapons, nuclear power, and the CIA. R. at 695, 698, 701-02. The ASUC Senate also adopted resolutions concerning electoral politics. In addition to supporting various ballot propositions, resolutions were also adopted supporting the reelection of Congressman Dellums. Reporters Transcript at 221. Nor were the concerns of the ASUC Senate limited to this country. Resolutions were

adopted concerning South Africa, Argentina, the Soviet Union, and supporting attempts to convince Third World countries to boycott Nestle baby formula. R. at 694, 696.

The resolutions weren't simply adopted and forgotten. The ASUC took steps to publicize the positions taken by the ASUC Senate. These steps included placing advertisements in the student newspaper, distributing posters, leaflets and flyers, sponsoring rallies and workshops, and placing notices on campus bulletin boards. Pet. App. at 29a. In addition to paying for this publicity, the compelled student fees also finance the "operation expenditures for the ASUC Senate." *Id.*

Campus Political Groups. Finally, compelled student fees are used to finance a variety of student groups. The funding of the vast majority of these groups is not at issue in this case. Instead, the respondents in this case only objected to the funding of campus political groups--14 in total. These groups included Amnesty International, Berkeley Students for Peace, Campus N.O.W., Campus Abortion Rights Action League, Gay and Lesbian League, Progressive Student Organization, Radical Education and Action Project, Spartacus Youth League, Students Against Intervention in El Salvador, Students for Economic Democracy, UC Berkeley Feminist Alliance and Women Organized Against Sexual

Harassment, UC Sierra Club, Conservation and Natural Resources Organization, and Greenpeace Berkeley. Pet. App. at 5a. Funding was not provided for mainstream political groups or religious groups. Petition for Writ of Certiorari at 4.

These groups are undoubtedly political and ideological in their focus. The Spartacus Youth League, for instance, described itself as seeking "'to build a revolutionary socialist movement which can intervene in all social struggles armed with a working class program based on the politics of Marx, Lenin and Trotsky, as part of a disciplined revolutionary movement.'" Pet. App. at 21a. The group supported the Soviet invasion of Afghanistan and opposed the Solidarity movement in Poland. *Id.*

While opposing the use of dissenting students' compelled fees to finance these organizations, respondents do not suggest limiting the free speech activities of any group. Respondents sought only to avoid compelled financial support for political messages with which they disagreed. Neither the complaint in this action nor the decision of the California Supreme Court will in any way diminish the freedom of any student or group of students to engage in political speech on the Berkeley campus.

SUMMARY OF ARGUMENT

Review is not warranted in this case because the California judicial proceedings are not yet final. The decision of the California Supreme Court contemplates further proceedings at which the university will be given an opportunity to establish that the educational value of the activities at issue outweigh the First Amendment injury or that compelled student fees have not been spent in the manner alleged. Until this inquiry has been completed, there is little for this Court to review other than the holding that off-campus political activity may not be funded with compelled fees--a holding that is consistent with the decision of every other court to review the question.

Review cannot be justified on the basis of a conflict in decisional law. The California Supreme Court's decision makes clear that it was following existing federal precedent. The conflict that petitioners attempt to create results from comparing factually dissimilar cases. Finally, petitioners themselves are in conflict with the decisions on which they rely on the issue of off-campus political activity.

ARGUMENT

I

CALIFORNIA JUDICIAL PROCEEDINGS ARE NOT YET FINAL

As a result of the California Supreme Court decision, not a single student political group has been denied funding nor has the ASUC Senate been prohibited from enacting a single resolution. This is because the California Supreme Court decision contemplates further proceedings both in this action and beyond. In fact, the only final determination of the California Supreme Court is that dissenting students' compelled fees could not be used for off-campus political activities, such as the Municipal Lobby and the University of California Lobby. This was a determination on which the California Supreme Court was in unanimous agreement. Pet. App. at 27a, 51a. It is a determination that is in accord with the decision of every other court to consider the question. *E.g.*, *Carroll v. Blinken*, 957 F.2d 991, 1002 (2d Cir. 1992); *Galda v. Rutgers*, 772 F.2d 1060, 1065 (3d Cir. 1985).

The California Supreme Court did not rule that any particular student political group could no longer receive compelled student fees. Instead, the court below ordered the university to establish a procedure similar to that outlined in

Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986), if the university decided to implement educational programs that burden First Amendment rights. Pet. App. at 22a. The court noted that the use of compelled fees to support political groups is permissible unless the group's educational function is merely incidental to the political and ideological activities. *Id.* When the attainment of the group's political goals predominate, the infringement of dissenting students' constitutional rights can no longer be justified by the claimed educational benefit. *Id.*

The court also intimated that overtly political groups could continue to receive university financial support under a different funding mechanism. The court's ruling requiring a *Hudson* hearing applied only to political groups that are funded from compelled student fees. *Id.* Thus, on the state of this record, petitioners can only argue that the university has been prohibited from using compelled fees of dissenting students to finance overt political activity with only an incidental educational benefit.

Similarly, there was no final court ruling on the issue of ideological resolutions adopted by the ASUC Senate. The court noted that the university denied that any compelled fees were spent for this activity, but also noted that the publicity for the resolutions must logically cost something "if only for

paper and ink." Pet. App. at 29a. Finally, the court concluded that neither the trial court nor the intermediate appellate court had yet to address adequately the factual and legal issues involved in this issue. *Id.* The court remanded this question to the lower court to resolve whether compelled fees were spent on political activities of the ASUC Senate. If so, the university would have the burden of establishing that the resulting burden on dissenting students' First Amendment rights was justified by the educational value of the activities in question. As with student political groups, the university must establish that the educational value of the program is more than merely incidental to the political activity. Pet. App. at 30a. Because these determinations have yet to be made, there is nothing for this Court to review at this time. The petition for writ of certiorari should be denied.

II

THE DECISION DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS

The major premise of the petition is that the decision below conflicts with the Second Circuit's decision in *Carroll*

v. Blinken.[5] In fact, however, the California Supreme Court explicitly harmonized its decision with both that of the Second Circuit in *Carroll* and that of the Third Circuit in *Galda v. Rutgers*. Pet. App. at 13a-19a.

The real problem with comparing the decision below to that in *Carroll* is that where *Carroll* involved a challenge to a single specific expenditure, the California Supreme Court treated this case as something more akin to a facial challenge. As noted above, the California Supreme Court did not prohibit the use of compelled fees for a single student group. Instead, the court set out guidelines by which the university could determine the types of groups that could receive compelled fees regardless of dissent. The guiding light for the university is whether the educational benefit is merely incidental to the accomplishment of the group's political objectives. Pet. App. at 22a.

This analysis fits easily within the specific factual findings of the Second Circuit in the *Carroll* case. In *Carroll*, the court noted that while NYPIRG was a political group with definite political goals, its on-campus activities

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[5] Of course, petitioners' position conflicts in substantial measure with the decision in *Carroll*. Where the *Carroll* court prohibited off-campus political activities with dissenters' fees, petitioners seek authority to spend dissenters' compelled fees to lobby city government and the State Legislature. *Compare Carroll*, 957 F.2d at 1002 *with* Petition for Writ of Certiorari at 28-30.

were described as being more educational in nature. The court described those activities as primarily research and the sponsorship of symposia and debates. *Carroll*, 957 F.2d at 994. It should also be noted that the university in *Carroll* took a more active role in approving the expenditures at issue. The activities on which student fees could be spent were specifically described in regulations adopted pursuant to New York's education law. The regulation at issue there required the fees to be spent on educational activities. *Id.* at 993 n.4. The decision to fund a particular group was also approved by the university president. *Id.* at 993. No similar university controls or approval processes exist in the instant action. Thus, to the extent that petitioners seek to find conflict with the *Carroll* decision, they do so on the basis of dissimilar facts.

The decision is also consistent with the prior rulings of this Court. This Court has long held that the use of compelled fees for political activities has an impact on the fee payers' First Amendment rights to freedom of speech and association. *Abood v. Detroit Board of Education*, 431 U.S. 209, 235 (1977); *Keller v. State Bar of California*, 496 U.S. 1, 14 (1990). Thus, the purpose for mandating payment of the fees must be supported by a compelling governmental interest. *Hudson*, 475 U.S. at 303 n.11. This is precisely

the analysis that was employed by the court below. Pet. App. at 10a. The court below noted that this analysis was also employed by the Second Circuit in *Carroll* and the Third Circuit in *Galda*. Pet. App. at 13a-19a. Thus, there is no conflict for this Court to resolve and the petition should be denied.

CONCLUSION

This case is not appropriate for review on certiorari at this time. The decision below contemplates further judicial review in California both in this case and beyond. Further, there is no decisional conflict with the Federal Circuit Courts of Appeals. The California Supreme Court noted that it was applying the same analysis as was applied in both the Second Circuit's *Carroll* decision and the Third Circuit's decision in *Galda*.

Despite petitioners' attempts to frame it so, this case has nothing to do with public forum analysis. In arguing that they do nothing more than create a public forum by financing *some* student political groups petitioners argue that there is no constitutional distinction between allowing these groups to use the university auditorium and buying each group its own auditorium to use however it wishes. This is nonsense. This case is not about opening up the Berkeley campus to differing

points of view. It is instead about financing some students' political views with the compelled fees of other students who disagree. The only educational purpose served by such a system is an object lesson of what life would be like without the First Amendment. Educational perhaps, but beyond the pale for even the ivory towers of the university.

For these reasons, the petition should be denied.

DATED: August, 1993.

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No. 93-82

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ASSOCIATED STUDENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*,
Petitioners,

v.

AVERELL SMITH, ARLO HALE SMITH, ADLAI SMITH, BRAD SPARKS, JIMMY HOM, EMILY TAYLOR, ALEXA SMITH, THOMAS KISTLER,
Respondents.

On Petition for Writ of Certiorari to the California Supreme Court

BRIEF OF *AMICUS CURIAE* OF THE AMERICAN COUNCIL ON EDUCATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
ARGUMENT	3
I. BECAUSE THE PUBLIC FORUM PROVIDED BY STUDENT ACTIVITY GROUPS PLAYS A VITAL ROLE IN A UNIVERSITY'S EDUCATIONAL MISSION, FUNDING SUCH GROUPS DOES NOT VIOLATE THE FIRST AMENDMENT	3
A. The On-Campus Forum Provided by Student Groups Satisfies Important University Interests	3
B. The California Supreme Court Failed to Give Appropriate Judicial Deference to the University's Decision to Provide a Student Forum	7
II. FORCING THE UNIVERSITY TO DISTINGUISH BETWEEN "POLITICAL" AND "EDUCATIONAL" STUDENT GROUPS RISKS VIOLATING STUDENTS' FIRST AMENDMENT RIGHTS	8
CONCLUSION	11

TABLE OF AUTHORITIES

Cases	Page
Abood v. Detroit Board of Education, 431 U.S. 209 (1977)	5
Carroll v. Blinken, 957 F.2d 991 (2d Cir.), *cert. denied*, —— U.S. ——, 113 S. Ct. 300 (1992)	5
Gay & Lesbian Student Ass'n v. Gohn, 850 F.2d 361 (8th Cir. 1988)	10
Hays County Guardian v. Supple, 969 F.2d 111 (5th Cir. 1992), *cert. denied*, —— U.S. ——, 113 S. Ct. 1067 (1993)	7
Kania v. Fordham, 702 F.2d 475 (4th Cir. 1983)	4, 5, 7
Keller v. State Bar of California, 496 U.S. 1 (1990)	5
Keyishian v. Board of Regents, 385 U.S. 589 (1967)	2, 3
Lamb's Chapel v. Center Moriches Union Free School District, 61 U.S.L.W. 4549 (U.S. June 7, 1993)	10, 11
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	4
Regan v. Taxation with Representation, 461 U.S. 540 (1983)	10
Smith v. Regents of the University of California, 4 Cal. 4th 843, 844 P.2d 500, 16 Cal. Rptr. 2d 181 (1993)	*passim*
Sweezy v. New Hampshire, 354 U.S. 234 (1957)	8
Turner v. Sayers, 575 So. 2d 1135 (Ala. Civ. App. 1991)	6
United States v. Associated Press, 52 F. Supp. 362 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945)	3
Veed v. Schwartzkopf, 353 F. Supp. 149 (D. Neb.), *aff'd*, 478 F.2d 1407 (8th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974)	5, 8
Widmar v. Vincent, 454 U.S. 263 (1981)	5, 9

Other Authorities	
D. Meabon, R. Alexander & K. Hunter, *Student Activity Fees—A Legal and National Perspective* (National Entertainment and Campus Activities Association 1979)	4

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Respondents.

On Petition for Writ of Certiorari to the California Supreme Court

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BRIEF OF *AMICUS CURIAE* OF THE AMERICAN COUNCIL ON EDUCATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The American Council on Education ("ACE") is a non-profit national educational association founded in 1918 whose members include more than 1,700 public and private colleges, universities, and educational organizations throughout the United States. As a leading participant in higher education affairs, ACE's purpose is to promote the interests of all members of the academic community—students, faculty, administration and the in-

stitutions themselves. ACE participates as an *amicus curiae* only on rare occasions when a case, such as this one, presents issues of significant importance to higher education in the United States.

A university's ability to pursue effectively its educational mission is of vital concern to ACE. Universities provide the "marketplace of ideas" where exposure to diverse views and participation in robust debate shape our future. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). This marketplace extends beyond the confines of the classroom to include participation in student activity groups and student government. Funding of these groups through student fees creates an on-campus forum for the expression of multiple viewpoints on a variety of issues.

The California Supreme Court in *Smith v. Regents of the University of California*, 4 Cal. 4th 843, 844 P.2d 500, 16 Cal. Rptr. 2d 181 (1993), held that mandatory student fees used to fund student activity groups and student government violate dissenting students' First Amendment rights where a group's educational function is outweighed by its function of advancing a "political" or "ideological" goal. This ruling ignores the important interest universities have in creating an on-campus forum to foster student debate on a variety of issues, including issues labeled "political" or "ideological." Student activity groups and student government play a vital role in education. Moreover, the ruling below imposes on universities an unworkable burden to pick and choose which student groups are more educational and less ideological.

This Court should grant certiorari to settle an important issue of federal constitutional law—the extent to which the First Amendment imposes constraints on the use of mandatory student fees. This issue is of great concern to the many public universities that impose some type of mandatory student fee. ACE requests that this Court eventually reverse the decision below and hold that

content-neutral funding of student activity groups, including political and ideological groups, does not violate the First Amendment because student groups play a vital role in a university's educational mission.

ARGUMENT

I. BECAUSE THE PUBLIC FORUM PROVIDED BY STUDENT ACTIVITY GROUPS PLAYS A VITAL ROLE IN A UNIVERSITY'S EDUCATIONAL MISSION, FUNDING SUCH GROUPS DOES NOT VIOLATE THE FIRST AMENDMENT

A. The On-Campus Forum Provided by Student Groups Satisfies Important University Interests

Education is not limited to the classroom. The university atmosphere—conferences, debates, student government, lectures, and classes—all contribute to the university's educational mission to train our future citizens and leaders by providing "wide exposure to that robust exchange of ideas which discover the truth 'out of a multitude of tongues.'" *Keyishian*, 385 U.S. at 603 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945)). Such exposure encourages the experimentation and creative ideas that are the hallmark of our system of higher education.

Applying a strict scrutiny test, the California Supreme Court required that the University establish a compelling interest in the mandatory funding scheme that could not be satisfied by less restrictive means.[1] *Smith*, 844 P.2d

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[1] As the *Smith* dissent notes, "[n]either *Abood* nor *Keller* addressed directly the constitutional standard to be applied in balancing the state's interest in the collection and use of a mandatory fee against the infringement of associational rights occasioned thereby." *Smith*, 344 P.2d at 523 (Arabian, J., dissenting). Where funding is content-neutral and has only a minimal effect on associational rights, mid-level scrutiny requiring substantial or important interests may be appropriate. The "[g]overnment may abridge incidentally individual rights of free speech and association when

at 507. University funding of student activity groups does not violate the First Amendment prohibition against compelled association because the groups are vital to the University's educational mission.[2] In addition, providing a public forum through a content-neutral funding scheme has, at most, only a minimal impact on dissenting students' associational rights and is the least restrictive means of effectively promoting student speech.

Mandatory student fees provide a forum through student activity groups for the exercise of student speech. Like the University of California, many colleges and universities choose to fund student activities, including political and ideological activities, through the imposition of mandatory student fees. *See* D. Meabon, R. Alexander & K. Hunter, *Student Activity Fees—A Legal and National Perspective* 23-29 (National Entertainment and Campus Activities Association 1979). ACE's member colleges and universities believe that funding student activity groups enhances and serves their educational mission. Student activity groups are traditionally funded in a content-neutral manner, allowing even unpopular groups an opportunity to speak in the campus forum. For example, the University of California uses student fees to fund both Berkeley Right to Life, an anti-abortion group, and the Campus Abortion Rights Action League, a pro-choice or-

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engaged in furthering the constitutional goal of 'uninhibited, robust and wide-open expression.'" *Kania v. Fordham*, 702 F.2d 475, 480 (4th Cir. 1983) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

[2] The *Smith* majority holds that the University must satisfy strict scrutiny to justify mandatory fees to fund student government as well as student activity groups. *Smith*, 844 P.2d at 516-17. Student government is an inherent part of a university, and university funding of student government satisfies the same important interests as university funding of student activity groups. The analysis of the constitutional limitations on funding of student government is the same as the analysis applicable to student groups.

ganization. Activity groups encourage student involvement and result in participatory education.

The university atmosphere inherently includes "such a critical aspect of campus life" as extracurricular activities. *Widmar v. Vincent*, 454 U.S. 263, 278 n.2 (1981) (Stevens, J., concurring). Numerous lower courts recognize that education extends beyond the classroom and includes the funding of campus activities, such as student groups and student newspapers. *See, e.g., Carroll v. Blinken*, 957 F.2d 991 (2d Cir.), *cert. denied*, —— U.S. ——, 113 S. Ct. 300 (1992); *Kania v. Fordham*, 702 F.2d 475 (4th Cir. 1983) (upheld student funding of university newspaper); *Veed v. Schwartzkopf*, 353 F. Supp. 149 (D. Neb.), *aff'd*, 478 F.2d 1407 (8th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974) (use of mandatory student fees to subsidize school newspaper held constitutional). The important university interests met by student groups include "the promotion of extracurricular life, the transmission of skills and civic duty, and the stimulation of energetic campus debate." *Carroll*, 957 F.2d at 1001. Lack of funds significantly impairs the ability of student groups to participate in the forum. *Id.* These interests are sufficient to justify compelling students to fund a campus forum. *Id.*

In holding that the University could not fund political or ideological groups, the California Supreme Court found that at some point educational benefits become merely incidental to the group's goal of advancing political and ideological interests. *Smith*, 844 P.2d at 511. The court applied the standard established in the union shop and integrated bar cases, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and *Keller v. State Bar of California*, 496 U.S. 1 (1990), that the activity funded by the compelled fee must be "germane" to the organization's mission to overcome the infringement on First Amendment rights. *Smith*, 844 P.2d at 507.

Although *Keller* and *Abood* provide the general standard for analyzing whether compelled fees improperly infringe on First Amendment freedom of association, that standard should be applied in this instance within the context of higher education. *Keller* found that the use of compulsory state bar dues could not be used to finance ideological activities not necessarily related to the purpose of the compelled association—regulating the legal profession and improving legal services. Similarly, *Abood* held that a union could not use a dissenting individual's dues to fund ideological activities not germane to collective bargaining. The purposes of the state bar in *Keller*, to supervise attorney conduct, and the union shop in *Abood*, to negotiate contracts, are relatively narrow and definable.

The University's educational mission should not be construed so narrowly. Unlike the narrow focus of a state bar or labor union, education necessarily includes a broad range of political and ideological viewpoints. The court below even admits that "some student political activity is germane to the University's educational mission." *Smith*, 844 P.2d at 513. Moreover, colleges and universities across the country have numerous courses specifically aimed at presenting political and ideological ideas. Courses in history, literature, political science, and minority and women's studies necessarily require examination of various ideologies.

In addition to courses and student groups, campus speakers also expose students to various ideologies. In *Turner v. Sayers*, 575 So. 2d 1135 (Ala. Civ. App. 1991), student fees were used to fund a campus lecture series that included a speech relating to *Roe v. Wade* by one of the attorneys for the plaintiff in the case. The court upheld funding of the speech because it did not result in compelled association and "it is incumbent on a state university to promote the dissemination of ideas to its students. . . ." *Id.* at 1137.

Providing a university forum for learning and the exchange of diverse ideas can be met through various methods. Lectures in a classroom are one important method, but without the opportunity for students actively to express their own viewpoints, the learning process is incomplete. ACE believes that the California Supreme Court failed to recognize the uniqueness of the university's educational mission which, in the judgment of many higher education institutions, includes providing an on-campus forum for student speech.

The court below also failed to recognize that the University's use of student fees to fund a campus forum on a content-neutral basis does not force students to associate with a single position and, therefore, has little or no effect on First Amendment rights of association. *See Hays County Guardian v. Supple*, 969 F.2d 111, 123 (5th Cir. 1992), *cert. denied*, —— U.S. ——, 113 S. Ct. 1067 (1993) ("Creating a forum for student expression is a minimally restrictive means of advancing an educational interest."); *Kania*, 702 F.2d at 480 (same). Rather, the *Smith* majority relied significantly on both *Abood* and *Keller*, where mandatory dues were used to fund expression of a specific political or ideological viewpoint. In contrast, funding student activity groups on a content-neutral basis is a minimally restrictive means of providing a forum for student speech.

Public university funding of student groups, as well as student government, is constitutional because it satisfies an important and even compelling university interest and is the least restrictive means of satisfying this interest.

B. The California Supreme Court Failed to Give Appropriate Judicial Deference to the University's Decision to Provide a Student Forum

Universities have the expertise to decide how best to meet their educational mission. This Court has recog-

nized that governmental intervention in the intellectual life of a university should be avoided. *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring). Universities are "characterized by the spirit of free inquiry," and academic freedom gives the university the ability "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught and who may be admitted to study." *Sweezy*, 354 U.S. at 262-63 (Frankfurter, J., concurring).

The University of California made a judgment that the forum provided by funding student activity groups, including those engaged in political or ideological expression, plays a critical role in the University's educational mission. This decision should not be lightly ignored. As stated in *Veed v. Schwartzkopf*, "[w]ithin wide limitations, a state is free to adopt [its] educational policy," including the philosophy that the education of students extends beyond the classroom to publication of a school newspaper. *Veed*, 353 F. Supp. at 152. In fact, the court below recognized that "the Regents, to be effective, must have considerable discretion to determine how best to carry out the University's educational mission." *Smith*, 844 P.2d at 506. Despite recognizing the need for deference, the *Smith* majority failed to find that ideological and political student groups contribute to this mission. The court below improperly limited the University's academic freedom to decide how its students "shall be taught." *Sweezy*, 354 U.S. at 263.

II. FORCING THE UNIVERSITY TO DISTINGUISH BETWEEN "POLITICAL" AND "EDUCATIONAL" STUDENT GROUPS RISKS VIOLATING STUDENTS' FIRST AMENDMENT RIGHTS

When distributing funds to student organizations, the University must ensure that it does not violate the constitutional rights of students who wish to form campus organizations. Both the First Amendment public forum

doctrine and the subsidy doctrine significantly limit the type of distinction the University is permitted to make between organizations on the basis of their speech.

Since the campus of a public university possesses many of the characteristics of a public forum, the public forum doctrine is traditionally used to analyze university regulation of student speech. *Widmar*, 454 U.S. at 267 n.5 (rejecting attempt by university to exclude student religious organization from school facilities available to registered student groups). In the public forum context, exclusions from the forum based on the content of speech are allowed only to serve a compelling interest. *Id.* at 270. Once a university makes its facilities generally available to student groups, access to facilities cannot be denied based on the content of the group's speech without a compelling reason. *Id.* at 277. Under this same principle, universities are not permitted to discriminate among student groups based on the content or viewpoint of their speech where the administration of student activity fees supports a public forum.

The University of California currently uses the mandatory activity fee to create a public forum for students by distributing fees on a content-neutral basis. By funding groups without regard to the content or viewpoint of their speech, the University's policy detaches funding decisions from support or condemnation of different organizations' ideological positions. In contrast, the *Smith* majority's proposal that the University refuse funding for groups that are too "ideological" or "political" violates the rule against content and viewpoint discrimination in a public forum.

Further, as the *Smith* dissent points out, the distinction between educational and ideological or political speech is virtually impossible to make in many instances. Often, campus literature and presentations sponsored by "political" groups are educational. *Smith*, 844 P.2d at 525 (Arabian, J., dissenting). A university risks violating the

First Amendment if it categorizes a group such as the Sierra Club as political, while categorizing a campus group that organizes recycling as non-political, despite the fact that both groups gather information about the environment and advocate certain policies and strategies to preserve the environment.

In addition to restrictions placed on the University by the public forum doctrine, the First Amendment prohibits viewpoint discrimination where a speech subsidy is provided. A state university may provide a "forum for the expression of political and personal opinions with financial support of mandatorily assessed student fees . . . ." *Veed*, 353 F. Supp. at 152. Under subsidy analysis, if a public body chooses to fund speech it "must do so even-handedly, without discrimination among recipients on the basis of their ideology." *Gay & Lesbian Student Ass'n v. Gohn*, 850 F.2d 361, 362 (8th Cir. 1988) (holding that the First Amendment is violated where university denied funding for an association based on the content of the group's expression and no compelling support existed for this denial); *see also Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983) (holding that the state may not refuse to subsidize free speech on the basis of viewpoint). Applying this general rule in the context of student activity groups, a university, once it commits to funding student groups, cannot deny funding on the basis of the group's viewpoint on a particular issue.

Further, in light of this Court's recent holding in *Lamb's Chapel v. Center Moriches Union Free School District*, 61 U.S.L.W. 4549 (U.S. June 7, 1993), discrimination against the category of speech labeled "political" by the court below may amount to impermissible viewpoint discrimination. *Lamb's Chapel* held that "it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint." *Id.*

at 4552. A speaker may not be denied access to a forum "to suppress the point of view he espouses on an otherwise includible subject." *Id.* at 4550. Under this framework, a university cannot favor those student groups that have a less "political" viewpoint on a particular subject. If two groups that address women's issues exist, a campus Women's Studies Club and campus National Organization for Women ("N.O.W."), funding the former but not the latter may impermissibly discriminate against N.O.W. on the basis of its political viewpoint.

Whether administration of student organizations is looked at through the lens of forum analysis, subsidy analysis, or some combination of both, the content-neutral guidelines the University has in place ensure that neither content nor viewpoint discrimination against speech occurs. The court below would have the University disregard content-neutral funding in favor of a funding scheme that excludes certain student groups on the basis of their message. This rule invites and may require the University to violate First Amendment rights of students who belong to groups that are judged too "political" or "ideological."

CONCLUSION

For all of the above reasons, the American Council on Education respectfully urges that this Court grant the Petition for Certiorari.

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Supreme Court, U.S.
FILED
AUG 18 1993
OFFICE OF THE CLERK

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REGENTS OF THE UNIVERSITY OF CALIFORNIA et al.

Petitioners

vs.

AVERELL SMITH, et al.

Respondents

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

- -

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29 pp

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION AND SUMMARY OF ARGUMENT	1
REASONS FOR DENYING THE WRIT	5
I. THE UNIVERSITY'S ACTIONS TO COMPEL STUDENTS TO INVOLUNTARILY FUND POLITICAL AND IDEOLOGICAL ADVOCACY BY ASUC, AND ASUC LOBBIES AND FUNDED GROUPS CANNOT BE DEFENDED AS FUNDING OF A "PUBLIC FORUM"	5
A. ASUC AND ITS FUNDED LOBBIES ARE NOT "CONTENT-NEUTRAL" FORA, BUT PARTISAN ADVOCATES OF PARTICULAR VIEWPOINTS	5
B. ASUC DOES NOT OPERATE AS A "CONTENT-NEUTRAL" FORUM IN DISTRIBUTING FUNDS TO NON-ASUC ORGANIZATIONS	15
II. ASUC HAS NO CONSTITUTIONAL RIGHT TO HAVE ITS VIEWS SUBSIDIZED BY MANDATORY FEE FUNDS	23
CONCLUSION	25

TABLE OF AUTHORITIES

CASES

Abood v. Detroit Board of Education (1977) 431 U.S. 209 passim.

Buckley v. Valeo (1976) 424 U.S. 1 22

Cammarano v. U.S. (1959) 358 U.S. 498 24

Carroll v. Blinken (2nd Cir. 1992) 957 F.2d 991 passim.

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Gaudiya Vaishnava Society v. San Francisco (9th Cir. 1990) 900 F.2d 1369 19

Keller v. State Bar of California (1990) 496 U.S. 1 passim.

Lakewood v. Plain Dealer (1988) 486 U.S. 750 19

Lehnert v. Ferris Faculty Association (1991) __U.S. __ /114 L.Ed.2d 572/ passim.

Niemotko v. Maryland (1951) 340 U.S. 268 21

Pacific Gas & Electric v. California Public Utilities Commission (1986) 475 U.A. 1 passim.

Shuttlesworth v. Birmingham (1969) 394 U.S. 147 19

Staub v. Baxley (1957) 355 U.S. 313 19

U.C. Weapons Labs Conversion
Project v. Lawrence
Livermore Laboratory
(1984) 154 Cal.App.3d 1157 18,20

CONSTITUTIONAL PROVISIONS

United States Constitution:

First Amendment passim.

NO. 93-82

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Respondents

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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INTRODUCTION AND SUMMARY OF ARGUMENT

The petition for certiorari herein is highly misleading.

First, it is contended that this case only involves a challenge to "content-neutral" use of mandatory student fees to fund political and ideological activi-

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1. In their listing of parties, petitioners fail to mention respondent Marina

ties, and that respondents did not challenge alleged finding of "content-neutrality" before the California Supreme Court. Cert.Pet., 4. This is most untrue: As will be shown, post, the involuntary financing of political and ideological advocacy imposed by the University in this case is not content-neutral. Moreover, said lack of content-neutrality was repeatedly argued before the lower courts. See e.g. Brief On The Merits By Appellants Thomas Kistler and Emily Taylor, 26-18; Reply Brief On The Merits By Appellants Thomas Kistler and Emily Taylor, 8-18; Opposition To Petitions For Rehearing (Kistler and Taylor), 4-11.

Secondly, it is claimed that the political activities of ASUC, its lobbies and funded groups have somehow been

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fn. 1 (Cont'd.)

Trepetin and have served no papers on her counsel, Philip A. Larrabee.

restricted to "University-related" or "student-related" issues. Even assuming this distinction made a difference (respondents content, and the California Supreme Court found, it does not), the involuntarily-funded political and ideological advocacy has not been so limited. It has included support for ballot measures opposing draft registration, toughening water quality standards , and creating a split-roll system of property taxation, favoring election to office of certain candidates (e.g. Congressman Ronald Dellums and the left-leaning April Coalition/Berkeley Citizens Action faction in local elections) and opposing the election of others (e.g. President Reagan and former California Lieutenant Governor John Harmer), and support for causes such as gay and lesbian rights, opposition to restrictions on abortions, advocacy of

ratification of the ERA, gun control, the union position in numerous labor disputes (e.g. various UFW strikes and boycotts) and divestiture from South Africa.

The alleged "conflict" between the Second Circuit's decision in Carroll v. Blinken (2nd Cir. 1992) 957 F.2d 991 and the state court decision herein is not a "black and white" difference demanding reconciliation by this Court. On the contrary, while purporting to approve of much of the Carroll court's reasoning, petitioners ask this court to overturn the conclusions of both the Carroll and all seven justices of the California Supreme Court herein (including even the two dissenters) that a university cannot compel students to involuntarily fund off-campus lobbying activities.

There is not reason for this Court to review the well-reasoned decision of

the California Supreme Court in this matter.

REASONS FOR DENYING THE WRIT

I. THE UNIVERSITY'S ACTIONS TO COMPEL STUDENTS TO INVOLUTARILY FUND POLITICAL AND IDEOLOGICAL ADVOCACY BY ASUC, ASUC LOBBIES, AND ASUC-FUNDED GROUPS CANNOT BE DEFENDED AS FUNDING OF A "PUBLIC FORUM"

Petitioners' claim that the Universityonly compels students to fund a "public forum' which is "content neutral" finds no support in the record and is legally untenable.

A. ASUC AND ITS FUNDED LOBBIES ARE NOT "CONTENT NEUTRAL" FORA, BUT PARTISAN ADVOCATES OF PARTICULAR VIEWPOINTS

Petitioners' use of a "forum" argument to defend ASUC's funding of its <u>own</u> political activities and lobbies is somewhat surprising: Surprising because ASUC and its lobbies are <u>not</u> ideologic-

ally neutral.

ASUC itself regularly takes and advocates positions on legislation and other political and ideological matters, through resolutions of its senate, adoption of ASUC referenda, and otherwise. A few of the positions so taken have included support for the causes of gay and lesbian rights, divestment from South Africa, ratification of the ERA, gun control, and various labor strikes and boycotts (e.g. UFW and Nestle boycotts), and opposition to draft registration, hunting of harp seals, and most of the key policies of the last two Republican Administrations in Washington. See e.g. Trial Exhibits 253A, 253B, 254; Appellants' Appendix (A.A.) 802-814, 1055-1056, 1072-1076.

ASUC systematically promotes its political stances through three groups of

lobbies: in Washington, D.C., Sacramento, and Berkeley,[2] and funding of ASUC-controlled operations groups" such as the Draft Counseling Center, Renters Assistance Project, and various "voter registration" drives. These lobbies and operations groups regularly advocate political stances. Some examples have included support for divestment from South Africa, opposition to transit funding cuts, support for laws requiring payment of interest on tenant security deposits, support for a press shield amendment to the California Constitution, support for laws requiring modification of existing buildings for the disabled, opposition to draft registration, support for decriminalization of marijuana, support for

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2. Opposing counsel fail to note ASUC operates the ASUC National Student Lobby, formerly United States Student Association Berkeley Annex, to lobby Congress. Reporters' Transcript (R.T.) 401-406

legalizing in-law apartments, opposition to condominium conversions, opposition to rent increases for rent-controlled units, and opposition to approval of a pinball parlor.[3] See e.g. Trial Exhibits 107-129, 159-160, 167-173, 179-183, 198-199, 214-216, 218, 239-250; A.A. 723-730, 979-980, 990-1000; RT 401-406, 424-441, 464-477.

ASUC has also participated in or assisted litigation designed to achieve policy objectives supported by ASUC, such as challenging the validity of California's vagrancy laws, and the recall of leftist Berkeley City Councilmember D'Army Bailey. See AA 880; Trial Exhibits 253A, 253B, 254.

ASUC political activities have been far from "nonpartisan," let alone "non-political," but have included excursions

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3. The lobbies have thus "lobbied on a wide range of issue, many of which are totally unrelated to the university or its students," (Cert.Pet. 29, fn. 23).

into electoral politics. These have included support for election of Congressman Dellums, Mervyn Dymally for Lieutenant Governor, and April Coalition/ Berkeley Citizens Action candidates for local office, opposition to election of President Reagan, and support for ballot measures to enact rent controls, divest from South Africa, oppose draft registration, create a split-roll property tax system, and support a nuclear freeze.[4] RT 22-32, 172, 210, 221, 226-227, 238-255, 296-303, 376, 377, 404, 427-434, 464-467, 472, 530-539, 654, 662-663, 665, 673, 679-680, 775-781, 890-891, 973-991, 1112,

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fn. 3 (Cont'd.)

No prinicpled distinction can be made between this case and Carroll on said point.

4. The Student Lobby did endorse the Nuclear Freeze Initiative. RT 377. And the Municipal Lobby did support a divestment initiative (the so-called "Responsible Investment Ordinance"). A.A. 727, 979-980.

1118-1128, 1288; A.A. 667, 712-713, 727, 788, 797, 803-814, 903-904, 979-980; Trial Exhibits 137-144, 152, 173, 175, 179-180, 183, 191-197, 212, 214, 219, 223, 224, 229-236, 244, 245, 253A, 153B, 254, 2nd O - 7.

In utilizing the mandatory fee to promots ASUC's own ideological and political positions, ASUC certainly does not provide a "forum" for competing viewpoints. The ASUC lobbies do not lobby both for and against the same bill! The ASUC Renters Assistance Project does not simutaneously urder the Berkeley Rent Control Board to vote for both higher and lower rent increases! ASUC did not simultaneously both support and oppose the nuclear freeze and South Africa divestment initiatives!

Rather, as with labor union and bar association political and ideological activities that this Court has held

may not be financed out of compulsory fees (see Abood v. Detroit Board of Education (1977) 431 U.S. 209 and Keller v. State Bar of California (1990) 496 U.S. 1) compelled funding of political and ideological advocacy by ASUC, its lobbies and operations groups is not (arguably) permissible funding of a "public forum," but illegitimate mandatory funding of a particular viewpoint.

That such advocacy cannot be subsidized by State-compelled funding is plainly established by this Court's decisions in Lehnert v. Ferris Faculty Association (1991) __U.S.__ /114 L.Ed.2d 572/ and Pacific Gas and Electric ("PG&E") v. California Public Utilities Commission (1986) 475 U.S. 1, 14-15, 20.

ASUC's "lobbying and electoral speech is likely to concern topics about which individuals hold strong personal views." Lehnert, supra, at p. 595. "By

utilizing /students'/ funds for political lobbying and to garner support of the public in its endeavors, /ASUC/ would use each dissenter as 'an instrument for fostering public adherence to an ideological point of view he finds unacceptable.' The First Amendment protects the individual's right of participation in these spheres from precisely this type of invasion." Ibid. Indeed, even the non-electoral advocacy of ASUC on topics such as gay and lesbian rights, abortion, and gun control has been far more controversial in nature than a union's expenditures to enhance the reputation of the teaching profession, which this Court held, in Lehnert, are non-chargeable to dissenting members as "speech of a political nature in a public forum." Id., at p. 596.

The reasoning employed by this Court in PG&E, supra, 475 U.S. 1, to

invalidate an agency order compelling a public utility to use its billing envelopes to disseminate the positions of a ratepayer group that normally opposes PG&E in regulatory matters, transfers easily to this case: "/A student/ does not . . . have the right to be free from vigorous debate. But /he or she/ does have the right to be free from government restrictions that abridge /his or her/ own rights in order to 'enhance the relative voice' of /political/ opponents. . . . The /mandatory ASUC fee/ requires /dissenting students/ to assist in disseminating /ASUC's/ views; it does not equally constrain both sides of the debate about /many political and ideological matters on which ASUC advocates positions/ . . . Unlike . . . permissible government subsidies of speech, the /mandatory ASUC fee/ identifies a favored speaker . . . and forces the speaker's opponent/s/ - not the taxpaying

public - to assist in disseminating the speaker's message. Such a requirement necessarily burdens the expression of /dissenting students/." Id., at pp. 14-15. Any "State/ / interest in promoting speech by making a variety of views available to /students/" "is not furthered by /a compulsory subsidy to ASUC's political and ideological activities/ that is not content-neutral. Moreover, the means chosen to advance variety tend to inhibit expression of /dissenting students'/ views in order to promote /ASUC's/. . . . It follows that the /mandatory ASUC fee/ is not a narrowly tailored means of furthering this interest." PG&E, supra, at p. 20.

To the extent the mandatory ASUC fee is utilized to fund ASUC's advocacy of its political and ideological views no "forum" is involved, and this case is directly controlled by Abood and Keller. Indeed,

with respect to off-campus lobbying such as is practiced by the ASUC Washington, Sacramento and Berkeley lobbies, every court to consider the question, including Carroll and the dissenting members of the California Supreme Court in this case, has agreed.

B. ASUC DOES NOT OPERATE AS A "CONTENT NEUTRAL" FORUM IN DISTRIBUTING FUNDS TO NON-ASUC ORGANIZATIONS

Petitioners' "forum" argument must fail with respect to use of the mandatory ASUC fee to fund political and ideological advocacy by non-ASUC organizations for the same reasons as it falls short with respect to funding of ASUC's activities: lack of content neutrality.

In view of ASUC's own advocacy positions with respect to a broad range of political and ideological questions, it is not surprising that ASUC's funding of outside organizations has been markedly one-sided. Almost every group funded by ASUC

with any position on such matters has views congruent with those of ASUC on such matters as opposing nuclear power, supporting gay and lesbian rights, supporting the ERA, opposing draft registration, supporting rent control, opposing the death penalty, supporting the leftist Berkeley Citizens Action faction in local elections, and re-election of certain Democratic legislators, opposing key Reagan/Bush policies, and opposing tax reduction measures. See e.g. Trial Exhibits 137-139, 140, 145-150, 153-161, 163-165, 174-178, 183-184, 196-197, 201, 212, 214, 232-235, 245, 253A, 253B, 254; RT 238-255, 260, 272-287, 290-303, 304-326, 331-345, 346-353, 376-377, 455-463, 510-520, 521-528, 548-550, 654, 765-775, 1112, 1118-1121; A.A. 797-800, 883-884.[5]

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5. The claim that respondents objected to funding of only "fourteen groups" is belied by the record and is derived

To the extent groups that have opposing viewpoints have been funded at all, it has been at disproportionately low levels. For example in 1981, Berkeley Right to Life received but $100, while pro-abortion groups California Abortion Rights Action League, Berkeley Feminist Alliance, and Campus N.O.W. received some $3300 from ASUC. See Appendix, 455-457. And it was shown at trial that one conservative group which submitted a proper application was denied all ASUC funding whatsoever. RT 651-653, Exhibit 204.

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fn. 5 (Cont'd.)

from an oversimplified statement of respondents' position appearing in the lower court opinion. In fact, respondents objected to funding of over fifty political/ideological advocacy organizations by ASUC. A few of those not mentioned in the certiorari petition included People's Anti-Nuclear Collective, Young Socialist Alliance, Young Social Democrats, Revolutionary Student Youth Brigade, International Socialists, SANE, MEChA, United Farm Workers, Berkeley

This one-sidedness in ASUC funding is inevitable, given that ASUC enforces ideological conformity on the part of funded groups by making adherence to ASUC political boycott policies (e.g. UFW boycotts, Coors boycott, South Africa divestment) a condition for funding. Trial Exhibit 2nd K (3/11/82), 253, 254.

However, "it is unnecessary for respondents to prove any instances of actual past content-based discrimination in order to establish that the ASUC fee is not a "content-neutral" public forum. U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory (1984) 154 Cal.App.3d 1157, 1171.

It is settled First Amendment jurisprudence that access to a would-be "forum"

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fn. 5 (cont'd.)

Anti-Draft Alliance, Radical Student Union, Vacaville Prison Project, Students for Economic and Racial Justice and East Bay Right to Life.

must be governed by "narrow, objective, and definite standards to guide the licensing authority" so that content neutrality can be assured. Shuttlesworth v. Birmingham (1969) 394, U.S. 147, 150151. A sheme governing forum access "that contains no standards whatsoever - let alone standards designed to be 'narrow, definits and objective' - to guide . . . officials in their decisions" is constitutionally infirm. Dillon v. Municipal Court (1971) 4 Cal.3d 860, 870; see also Lakewood v. Plain Dealer (1988) 486 U.S. 750, 755-757; Staub v. Baxley (1957) 355 U.S. 313, 322, 325; Gaudiya Vaishnava Society v. San Francisco (9th Cir. 1990) 900 F.2d 1369, 1375. "Such discretion grants officials the power to discriminate . . . ." Gaudiya Vaishnava Society, supra, at p. 1375, quoting from an earlier case.

Because a standardless forum access policy poses a severe threat of potential lack of content-neutrality, a party challenging

such a scheme "need only show" the standardless nature of the policy. Weapons Labs Conversion Project, supra, 154 Cal.App.3d at p. 1171. "This is enough to establish a violation of the principle of equal protection, since unfettered 'discretion has the potential for becoming a means of suppressing a particular point of view.' . . ." Ibid.

ASUC's policies with respect to funding political and ideological advocacy groups present a textbook case of such an invalid standardless scheme. No "narrow, definite, and objective" criteria exist requiring ASUC to fund any given group or cause, or give such group or cause any particular amount of money. ASUC has no policy requiring it to give every group that meets certain fixed criteria (e.g. registration with the University as a campus organization) some set amount of money (e.g. $200 per group), or requiring it to apportion funds among groups meeting such fixed criteria on some

objective basis such a funding proportional to a group's membership (e.g. $5 per member) or the amount of voluntary contributions raised by the group (e.g. $1 from ASUC for every $1 raised voluntarily). On the contrary, the ASUC Finance Committee and ASUC Senate have absolute and unbridled discretion to determine which groups will be funded and the levels of funding allocated to each. RT 618-620, 622-624. "No standards appear anywhere; no narrowly drawn limitations; no circumscribing of this absolute power . . . . It is clear that all that has been said about the invalidity of such limitless discretion must be equally applicable here." Niemotko v. Maryland (1951) 340 U.S. 268, 272. Such standardless policies invite viewpoint-based discrimination by ASUC in alloting funds to political and ideological advocacy groups.

ASUC's use of mandatory fee funds to support such groups, thus, is in no way com-

parable to the "content-neutral subsidies" (PG&E, supra, 475 U.S. at pp. 14-15) upheld in Buckley v. Valeo (1976) 424 U.S. 1 and Regan v. Taxation With Representation (1983) 461 U.S. 540. In the latter two cases, unlike the instant one, the subsidies were allocated in accordance with narrow, definite objective criteria. Cf. Buckley, supra (federal statute gives matching funds to all candidates for President meeting statutory criteria, and equal amounts to all parties meeting statutory definition of "major" parties for general election campaign0; Regan, supra (subsidy to vetrans groups solely in form of tax deduction for contributions, so that amount of subsidy determined by amount of voluntary contributions).

Any "State/ / interest in promoting speech by making a variety of views available to /students/" is "not furthered by a/ / /mandatory ASUC fee/ that is not con-

tent neutral. . . . It follows that the /mandatory ASUC fee/ is not a narrowly tailored means of furthering this interest." PG&E, supra, 475 U.S. at p.20.

The lack of content neutrality makes the instant case wholly dissimilar from some (mostly pre-Abood/pre-Keller) authorities upholding use of mandatory student fees to fund student newspapers and other fora that were apparently content-neutral.

II. ASUC HAS NO CONSTITUTIONAL RIGHT TO HAVE ITS VIEWS SUBSIDIZED BY MANDATORY FEE FUNDS

Petitioners appear to suggest that restrictions on use of mandatory student fees to assure political and ideological advocacy is not funded by such fees will somehow abrige the First Amendment rights of ASUC and funded groups.

This Court has uniformly rejected similar claims. It is well settled that the constitutional right of free speech

does not include a right to have one's speech subsidized by the government or others. Cammarano v. U.S. (1959) 358 U.S. 498, 513, 515; Regan, supra, 461 U.S. 540.

As Justice Douglas noted in Cammarano, supra, at p. 515: "/The/ notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State . . . runs counter to our decisions . . ., and may indeed conflict with the underlying premise that a complete hands-off policy on the part of government is at times the only course consistent with First Amendment rights."

To require ASUC to fund political and ideological advocacy from voluntarily-contributed funds or profits from its commercial enterprises works no infringement of the rights of ASUC or funded groups.

CONCLUSION

The petition for certiorari should be denied.

DATED: 8/16/93

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No. 93-82

Supreme Court, U.S.
FILED
SEP 9 1993
OFFICE OF THE CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1993

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ASSOCIATED STUDENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,
Petitioners,

VS.

AVERELL SMITH, ARLO HALE SMITH, ADLAI SMITH, BRAD SPARKS, JIMMY HOM, EMILY TAYLOR, ALEXA SMITH, THOMAS KISTLER,
Respondents.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
ARGUMENT	1
I. THE DECISION BELOW IS FINAL.	1
A. The Opinion Below Is Final As To Funding Student Political Groups.	2
B. The Holding Below Is Final As To Funding The ASUC Senate's Own Political Activities.	5
II. THE DECISION BELOW IS ERRONEOUS AND CONFLICTS WITH *CARROLL V. BLINKEN*	7
CONCLUSION	10

TABLE OF AUTHORITIES

	Page
Cases	
Abood v. Detroit Board of Education, 431 U.S. 209 (1977)	2
Avery v. Midland County, 390 U.S. 474 (1968)	2
Carroll v. Blinken, 957 F.2d 991 (2d Cir.), *cert. denied*, --U.S.--, 121 L. Ed. 224 (1992)	1, 7, 8, 9, 10
Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986)	2, 7
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	4, 5, 6, 7
Department of Banking v. Pink, 317 U.S. 264 (1942)	2
First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987)	5
Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989)	4
Gay & Lesbian Students Ass'n v. Gohn, 850 F.2d 361 (8th Cir. 1988))	3
Kentucky v. Stincer, 482 U.S. 730 (1987)	8
McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940)	8

Page

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 4

Pennsylvania v. Ritchie, 480 U.S. 39 (1987) 6

Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) 4

Constitutional Provisions

U.S. CONST. amend. I *passim*

Statutes and Regulations

CAL. R. CT. 28(e)(2) 8

Respondents do not deny that the issue this case presents—whether and under what circumstances a public university can use mandatory student fees to support student political expression—is important. Instead, six Respondents contend the decision below is neither final nor in conflict with *Carroll v. Blinken*, 957 F.2d 991 (2d Cir.), *cert. denied*, --U.S.--, 121 L. Ed. 224 (1992), while the remaining Respondents (Thomas Kistler and Emily Taylor) defend the decision below on the merits. None of Respondents' arguments justifies denying certiorari.

ARGUMENT

I.

THE DECISION BELOW IS FINAL.

Respondents Averell Smith, *et al.* contend that the decision of the California Supreme Court is not yet final, as it "contemplates further proceedings both in this action and beyond." Opposition to Petition for Writ of Certiorari ("Smith Br.") at 9.[1] To the contrary, the California Supreme Court's opinion finally decides all three issues presented. It contemplates no further judicial proceedings on either the issue of off-campus lobbying, as to which the Smith Respondents concede finality (Smith Br. 9), or the issue concerning funding of individual student groups (*see* Part I(A), *infra*). Therefore, certiorari may be granted on these distinct issues without regard to the finality of the third issue, which involves funding the political activities of the ASUC Senate itself. As to that issue, moreover, review may be granted because the opinion below finally determines the federal issue, and contemplates only the application of that announced (and erroneous) standard to facts found in further proceedings. *See* Part I(B), *infra*.

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[1]The other opposition filed by Respondent Arlo Hale Smith, as counsel on behalf of Respondents Kistler and Taylor, will be referred to as "Kistler Br."

A. The Opinion Below Is Final As To Funding Student Political Groups.

The California Supreme Court's holding invalidating the University's present procedures for funding student political groups is unquestionably final. As Respondents themselves admit, the court "ordered the university to establish a procedure similar to that outlined in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986)," if it continues to use mandatory fees to fund political expression by student groups. Smith Br. 9-10. Although the court thus required the University to institute certain internal procedures, it neither ordered nor contemplated further *judicial* proceedings on this issue. Pet. App. 21a-22a. Indeed, the decision states unambiguously that "plaintiffs are entitled to relief on their claims regarding student groups and ASUC lobbying . . . ." Pet. App. 30a.[2]

The relief ordered by the decision below leaves Petitioners only two options, each of which would require immediate and major changes in the pre-litigation status quo should certiorari be denied. First, Petitioners can either not fund "overtly political groups" at all, or fund them under "a different funding mechanism." Smith Br. 10. Alternatively, Petitioners can institute the *Hudson*-type procedures imposed by the decision below. Pet. App. 22a.[3]

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[2]Under the California Supreme Court's opinion the only further *judicial* proceedings on the "student groups" issue will be the purely ministerial act of the lower court granting Respondents the relief ordered by the California Supreme Court. It has long been established that such ministerial acts do not bar finality. *See, e.g., Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 216 n.8 (1977) (judgment final where only ministerial acts remain on remand); *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942) (same). And while the decision below requires the University to provide an internal administrative remedy, a state court's order requiring a state agency to provide such relief is final. *See, e.g., Avery v. Midland County*, 390 U.S. 474, 478 n.2 (1968) (Texas Supreme Court order requiring county government to redistrict held final, as the "opinion contemplated no further proceedings in the lower Texas courts . . .").

[3]Respondents argue that the decision is not final because "not a single

(continued...)

These procedures will work a fundamental change in Petitioners' use of mandatory fees. The decision below requires the University first to determine—for *each* of the groups whose funding is at issue—whether the educational benefits provided by their activities were outweighed by or incidental to their political goals.[4] Making these determinations will require Petitioners to engage in viewpoint discrimination that is both offensive to the First Amendment (*see* Pet. 24-26; *Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361, 367-68 (8th Cir. 1988)), and a wholly unnecessary administrative burden. Then the University must also provide Respondents with "an adequate explanation of the basis" for its decisions, "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." Pet. App. 22a (citation omitted).

The impact of this case, of course, is not limited to the past use of funds by the groups Respondents chose to

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[3](...continued)
student political group has been denied funding . . . ." Smith Br. 9. That argument misses the point. The issue here is the process by which funding decisions are made, not the outcome of those decisions. Moreover, the student political groups are not parties to this proceeding. As to the parties before the Court, the University and the ASUC, relief is final because they will have to change their procedures if certiorari is denied.

[4]The Smith Respondents assert that the California Supreme Court permitted the use of mandatory fees "unless the group's educational function is merely incidental to its political and ideological activities." Smith Br. 10. The opinion below, however, is quite ambiguous, also describing the test as whether "a group's dedication to achieving its political or ideological goals, at some point, *begins to outweigh* any legitimate claim it may have to be educating students . . . ." Pet. App. 12a (emphasis added). Whichever test applies, the University will have to weigh the political and ideological content of speech against its educational value—an inquiry which turns the First Amendment on its head by presuming that speech devoted to a political purpose cannot also be educational. *See* Brief of *Amicus Curiae* American Council on Education 3-7.

challenge. The decision below would require the University to implement the same intrusive procedures with respect to every student group *currently* requesting or receiving mandatory fee proceeds. Moreover, the University would have to carry out this sweeping, campus-wide review annually as groups' members, goals, and agendas change and as new groups request funding.

In addition, failure to review the decision below will place all of California's many public universities in limbo regarding the important First Amendment issues raised by this case, pending resolution of the separate and distinct issue of funding for the ASUC Senate's own political activities. That too is a reason for prompt review. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485-86 (1975); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974) ("[w]hichever way we were to decide on the merits, it would be intolerable to leave unanswered . . . an important question . . . under the First Amendment"). In *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989), this Court recognized that "[a]djudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits application of an exception to the general finality rule." *Id.* at 55; *see also Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (reviewing protective order barring publication of information gained through discovery in pending litigation). The uncertainty created by the decision below in an important area of First Amendment law must be avoided, particularly where it would leave California universities struggling to apply a different standard than universities in other states.

Because both the student groups and off-campus lobbying issues are unquestionably final, this Court can and should grant certiorari as to the first and third questions presented (Pet. i) without regard to the finality of the second question. Those two "distinct issue[s] of federal law will survive and require decision no matter how further proceedings resolve the issues concerning" the use of mandatory fees to fund the ASUC's own political activities.

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 309 n.3 (1987); *Cox*, 420 U.S. at 480. In an analogous setting, *First English* granted review of a takings claim even though a parallel claim for inverse condemnation had been remanded for further proceedings. This Court should grant review however it resolves the remaining issue. Moreover, as we show in the next section, that third issue is also final and reviewable.

B. The Holding Below Is Final As To Funding The ASUC Senate's Own Political Activities.

The California Supreme Court has ordered further judicial proceedings on the issue of the ASUC's own political activities, which consist primarily of passing resolutions. Pet. App. 30a. On remand, the trial court must determine whether mandatory fees have been spent on such activities. If the court finds that fees have been so spent, it will then have to determine whether the expenditures are justified by their educational value, applying the same strict scrutiny standard applied to funding of other student groups. *Id.* Regardless of the outcome upon remand, that standard will inevitably survive, and is final for purposes of Supreme Court review.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), is the seminal decision on finality of state court decisions. In *Cox*, the Georgia Supreme Court upheld the constitutionality of a statute giving rise to a civil action for publication of the identity of a rape victim. It remanded, however, for further factual determinations in light of its constitutional holding. Despite those pending proceedings, this Court found the decision final and reviewable.

Just as in *Cox*, the ASUC Senate funding issue is one:

> "where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue

> by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action . . . [in] the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." (*Id.* at 482-83)

This case meets each of these criteria. First, if on remand Petitioners establish that no mandatory fee proceeds were spent on ASUC political activities, they would prevail on nonfederal grounds.[5] In that event, this Court could not review the erroneous California Supreme Court decision applying the wrong First Amendment standard to the issue this case presents; the unreviewed decision of the California Supreme Court would be left standing (*id.* at 485-86); and the conflict with the Second Circuit would remain unresolved.

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[5]In *Cox* the party relying on the First Amendment had lost in the state courts and faced a trial on a state claim in which the First Amendment could not be raised as a defense. Here Respondents brought a First Amendment claim and will prevail on this issue if they can carry their burden on the remanded questions. That distinction is immaterial, however, because there are First Amendment interests on both sides of this case. Just as in *Cox*, Petitioners will not be able to assert their First Amendment position as a justification for any mandatory fee proceeds spent by the ASUC on "political" resolutions because the California courts will be bound under the law-of-the-case doctrine by the California Supreme Court's erroneous decision. A second, unnecessary trip through the state courts is not required "on an issue that has been authoritatively decided by the highest state court." *Pennsylvania v. Ritchie*, 480 U.S. 39, 48 n.7 (1987). "The goals of finality would be frustrated, rather than furthered, by these wasteful and time-consuming procedures." *Id.* Moreover, if Petitioners prevail on remand by showing that the ASUC Senate expenditures are justified by their educational value, the federal issue would be preserved for this Court's review only if Respondents appeal—a circumstance outside Petitioners' control.

Second, "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action . . . [in] the state proceedings still to come." *Id.* at 482-83. If Petitioners are correct in contending that the constitutional question was improperly decided below, "there should be no trial at all." *Id.* at 485.

Third, allowing the decision below to remain standing will "seriously erode federal policy." *Id.* at 483. If the ASUC and other California student governments know activities their adversaries view as "political" can cause them to lose mandatory fee proceeds, they will not engage in speech that might arguably be challenged as "political." Speech encouraged by the First Amendment will be chilled. Pet. 27 & n.21.

Reaching the merits in circumstances such as this "is consistent with the pragmatic approach" this Court has followed, especially where failing to do so would leave unanswered important First Amendment questions. 420 U.S. at 486; *see* p. 4, *supra.* The First Amendment issue concerning funding of the ASUC Senate should be reviewed by this Court to resolve the uncertainty created by the decision below in an important area of First Amendment law.

II.

THE DECISION BELOW IS ERRONEOUS AND CONFLICTS WITH *CARROLL V. BLINKEN.*

The principal holding below is that Petitioners may not use mandatory fees to fund on-campus political expression by student groups without (1) attempting to determine which groups provide educational benefits that are outweighed by or incidental to the groups' political goals and (2) affording dissenting students the remedies provided in *Chicago Teachers Union v. Hudson,* 475 U.S. 292 (1986). This basic holding is erroneous for all the reasons explained in the Petition for Certiorari. Pet. 9-26. It cannot be defended on the ground that the funding decisions are not content-

neutral, both because that argument is procedurally barred and because it is wrong. Nor can it be defended as consistent with *Carroll*.

Respondents Kistler and Taylor do not deny that if the funding of student groups creates a public forum, funding must be available to all groups without regard to the content of their speech. Instead, they say Petitioners have not created a public forum because the ASUC's funding decisions are neither content-neutral nor based on objective standards. Kistler Br. 15-23. These contentions are procedurally barred. Kistler and Taylor did not seek review in the California Supreme Court of the Court of Appeal's second opinion. They cannot support the decision below on the basis of contentions that were never properly raised in that court. *Kentucky v. Stincer*, 482 U.S. 730, 747 n.22 (1987); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 435 (1940).[6] Moreover, every court that has reached the issue has determined that ASUC funding is content-neutral.[7]

The Smith Respondents argue there is no conflict both because this case is distinguishable from *Carroll* on its facts and because the court below applied the same standard adopted in *Carroll*. Neither argument is correct.

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[6]The petition for review that was filed on behalf of the Smith Respondents in the California Supreme Court did not challenge the Court of Appeal's decision on the grounds now raised by Kistler and Taylor. Accordingly, the California Supreme Court was not required to—and did not—consider these grounds for reversing the Court of Appeal's decision even though Kistler and Taylor belatedly raised them in their briefs on the merits in that court. CAL. R. CT. 28(e)(2).

[7]Pet. App. 133a; Pet. App. 115a; Pet. App. 86a. The California Supreme Court did not decide otherwise. Moreover, there is no evidence of viewpoint-discrimination in the ASUC's funding decisions. The "conservative group" (Kistler Br. 17) whose funding was denied was the "Berkeley College Young Republicans" (RT 651-52), which—as a partisan organization—could not be funded.

Respondents suggest that the university's role in approving expenditures in *Carroll* was more active because the president approved funding decisions and because those decisions were governed by regulations requiring the fees to be spent on "educational activities." Smith Br. 13. Yet they do not explain why this is a material fact and, in any event, it does not distinguish *Carroll* from this case. Applicable standards require student organizations to use funds "for purposes or programs related to the University or beneficial to the student body . . . ." Pet. App. 73a. Similarly, the student government cannot use mandatory fees "except for University-related" purposes. RT 1064; Exh. 10 ¶63.00. The University Chancellor testified that one of his responsibilities was "to assure that lots of viewpoints are represented" (RT 1045) and that he relied on the vice-chancellor to monitor grants to make sure that they complied with applicable rules (RT 1086-87).

Carroll indisputably conflicts with the decision below, notwithstanding that the plaintiffs there challenged funding for only one specific group. In deciding that NYPIRG could use mandatory fees for on-campus ideological expression, the Second Circuit recognized its decision could affect other groups (957 F.2d at 1001) and adopted a standard for on-campus use of mandatory fees that does not require any inquiry into the content of speech. Under *Carroll*, therefore, any on-campus student political group—no matter how ideological—may be funded as long as it will add its voice to the "thriving campus forum of vigorous advocacy and political action." *Id.*[8] The decision below, in contrast, presumes that political speech is not educational by forcing the University to weigh the political content of speech

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[8]Respondents base their argument on the suggestion that *Carroll* described NYPIRG's activities as educational. Smith Br. 12-13. To the contrary, *Carroll* described NYPIRG as "an ideological organization" (957 F.2d at 994), which pursued its political goals on campus by, *inter alia*, "petition[ing] against nuclear power." *Id.* at 1001. It was that very partisanship that fulfilled the University's "traditional mission in a free society." *Id.*

against its educational value. Moreover, the decision below applies strict scrutiny, while *Carroll* applies a lesser standard of review that does not incorporate a less restrictive alternative analysis. Pet. 13-14. Certiorari should be granted to resolve this fundamental split in First Amendment jurisprudence.

CONCLUSION

For the reasons expressed in this brief and the Petition, we respectfully urge the Court to grant certiorari.

DATED: September 9, 1993. Respectfully,

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